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California Legal Forms--Transaction Guide

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DIVISION V: CONTRACTS AND OBLIGATIONS
CHAPTER 75 FORMATION OF CONTRACTS AND STANDARD CONTRACTUAL PROVISIONS

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DIVISION V: CONTRACTS AND OBLIGATIONS
CHAPTER 75 FORMATION OF CONTRACTS AND STANDARD CONTRACTUAL PROVISIONS

27-75 California Legal Forms--Transaction Guide Scope

Scope

Scope

This chapter covers the drafting of contracts in general. It contains basic discussion of the elements and common features of contracts and illustrates basic contract forms and standard provisions commonly used in drafting many or most types of contracts. Contracts for specific purposes and contracts subject to particular statutory requirements are discussed in other chapters covering the subjects of those contracts. For a list of relevant topics in this publication, see § 75.07[1] in the research guide to this chapter.



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§ 75.01 California Sources

[1] Constitution

California laws impairing contract obligations prohibited. *Cal. Const., art. I, § 9.*

[2] Statutes

Gifts. *Civ. Code §§ 1040, 1146.*

Acknowledgment and proof of execution of instruments. *Civ. Code § 1180 et seq.*

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Obligations imposed by law. *Civ. Code § 1708 et seq.*

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Arbitration and conciliation of international commercial disputes. *Code Civ. Proc. § 1297.11 et seq.*

Parol evidence rule. *Code Civ. Proc. § 1856.*

Writing interpreted in light of place of execution. *Code Civ. Proc. § 1857.*

Seals and execution of instruments. *Code Civ. Proc. § 1929 et seq.*

Execution of instrument by partner binds partnership. *Corp. Code § 16301.*

Presumption in favor of recitals in writing. *Evid. Code § 622.*

Legal Topics:

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

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§ 75.02 United States Constitution

State laws impairing contract obligations are prohibited. U.S. Const., art. I, § 10.

Legal Topics:

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

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§ 75.03 Federal Statutes

Electronic Signatures in Global and National Commerce (E-SIGN) Act. Pub. L. No. 106-229 (June 30, 2000); 15 U.S.C. §§ 7001 *et seq.*, 7021, 7031.

Legal Topics:

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Legal Topics:

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

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§ 75.06 Annotations

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Legal Topics:

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§ 75.07 Text References

[1] Matthew Bender Sources

California Legal Forms (Matthew Bender).

NOTE:

The following list is not intended as a complete reference to all of the specific contract forms in this publication, but may be used as a general guide to locating specific types of contracts.

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Ch. 2A, *Incorporating a Going Business* (preincorporation agreement to incorporate existing partnership).

Ch. 8B, *Voting Agreements and Voting Trusts* (proxy and voting agreements governing corporate shares).

Ch. 8C, *Close Corporation Shareholder Agreements* (agreements between shareholders regarding corporate management and other matters).

Ch. 8D, *Buy-Sell Agreements* (agreements to buy and sell interests in closely held corporations).

Ch. 11A, *Cash Purchase of Shares* (agreements to purchase corporate stock for cash).

Ch. 11B, *Cash Purchase of Assets* (agreements to purchase corporate assets for cash).

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Ch. 11D, *Acquisition of Shares for Shares* (agreements to acquire corporation via stock-for-stock exchange).

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- Ch. 12C, *Limited Liability Companies* (LLC operating agreements and related forms)
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- Ch. 15A, *Formation of Limited Partnerships* (limited partnership agreements).
- Ch. 16C, *Limited Liability Partnerships* (LLP agreements).
- Ch. 17, *Buying and Selling a Business or Professional Practice* (agreements to buy and sell business).
- Ch. 18, *Buying and Selling a Retail Alcoholic Beverage License and Business* (contract for sale of retail alcoholic beverage license and business).
- Ch. 21, *Agreements with Real Estate Brokers and Agents* (real estate broker agreements).
- Ch. 22, *Options to Purchase Real Property* (real property option agreements).
- Ch. 23, *Real Property Sales Agreements* (agreement for the sale of real property).
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- Ch. 30C, *Agreements with Architects, Engineers, and Other Design Professionals* (agreements for services of design professionals).
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- Ch. 38, *Real Property Management* (contracts between property owner and property manager).
- Ch. 45, *Consumer Installment Loans and Credit Sales* (credit agreements).
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- Ch. 47, *Automobile Financing and Vehicle Leasing* (agreements for sale or lease of motor vehicles).

Ch. 49, *Agricultural Contracts*.

Ch. 50, *Advertising and Promotion* (agreements for advertising).

Ch. 51, *Franchise Agreements* (franchise agreements).

Ch. 52, *Sales of Goods Under the Uniform Commercial Code* (general contracts for sales of goods).

Ch. 53, *Personal Property Leasing* (commercial and equipment leasing agreements).

Ch. 54, *Shipment of Property* (contracts for shipment of commercial and household goods).

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Ch. 55, *Negotiable Instruments* (promissory notes; liability and collection forms).

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Ch. 76, *Assignments of Rights and Obligations* (agreements for assigning rights).

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Ch. 79, *Suretyship, Guaranty, and Indemnity* (suretyship contracts; guaranty contracts; contracts for indemnification).

Ch. 84, *Independent Contractors* (agreements for independent contractors).

Ch. 85, *Employment Agreements* (agreements for employment).

Ch. 86, *Agreements for Professional Services* (agreements for consultant, accountant and other professional services).

Ch. 87, *Entertainment Contracts* (television, theater, music and talent agency contracts).

Ch. 87A, *Athlete Agents* (retainer agreements for athlete agents).

Ch. 89, *Home Improvement and Specialty Contracts* (contracts for home improvement; specialty construction contracts).

Ch. 90A, *State Government Contracts* (contracts for state property).

Ch. 90B, *Federal Government Contracts* (contracts for federal property).

Ch. 91, *Contracts with Sales Representatives* (agreements for non-employee sales agents).

Ch. 92, *Service Contracts* (contracts for the performance of services).

Ch. 93, *Agreements for Automatic Merchandising* (agreements between location owners and vending machine operators).

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Ch. 100, *Control, Custody, and Support of Minors* (child rearing agreements; agreements for emancipating minors; artificial insemination and surrogate parenting agreements).

Ch. 100A, *Personal Affairs of Minors* (agreements for minor's medical care; agreements relating to minor's personal property).

Ch. 100B, *Contracts and Employment of Minors* (agreements for employment of minors).

Ch. 100C, *Child Care Facilities* (child care facility agreements).

Ch. 102, *Bailments* (agreements for the deposit of personal property).

Ch. 102E, *Sales and Loans of Artwork* (agreements for the sale and loan of artwork).

Ch. 103, *Invention Development Services* (agreements for development and marketing of inventions).

Ch. 103A, *Copyrights* (agreements for transfer or assignment of copyright).

Ch. 104, *Health Care Transactions, Consents, and Directives* (health care agreements).

Ch. 105, *Nursing Homes and Care for the Elderly* (long-term, residential and continuing care contracts).

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- Ch. 94, *Attorneys' Fees and Litigation Expenses*.
- Ch. 95, *Confidentiality*.
- Ch. 96, *Consent*.
- Ch. 97, *Duration*.
- Ch. 98, *Force Majeure*.
- Ch. 99, *Good Faith, Best Efforts, and Further Assurance*.
- Ch. 100, *Indemnification*.
- Ch. 101, *Integration*.
- Ch. 102, *Interpretation*.
- Ch. 103, *Jurisdiction and Venue (Forum and Selection) Clauses*.
- Ch. 104, *Late Payments*.
- Ch. 105, *Limitation of Liability*.
- Ch. 106, *Liquidated Damages*.
- Ch. 107, *Notice*.
- Ch. 108, *Relations of Parties*.
- Ch. 109, *Remedies*.
- Ch. 110, *Signatures*.
- Ch. 112, *Termination and Cancellation*.
- Ch. 113, *Third Party Beneficiaries*.

[2] Additional Text References

Witkin, Summary of California Law, vol. 1, *Contracts*, §§ 1-1042; vol. 2, *Insurance* §§ 21, 22, 26-28, 32-33, 37-42, 51, 53-60, 62-67, 70-80, 82, 89-113, 116-122, 127-130, 132-135, 137-151, 153-157, 159, 162, 174, 216-219, 221-232, 239-241, 243-250, 253, 277-280, 283, 299, 317, 320, 322-323 (10th ed. 2005).

Restatement (Second) of Contracts §§ 1-385 (1981).

Legal Topics:

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

Contracts LawContract Conditions & ProvisionsGeneral OverviewContracts LawFormationGeneral Overview



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DIVISION V: CONTRACTS AND OBLIGATIONS
CHAPTER 75 FORMATION OF CONTRACTS AND STANDARD CONTRACTUAL PROVISIONS
PART I. RESEARCH GUIDE
B. Secondary Sources

27-75 California Legal Forms--Transaction Guide §§ 75.08-75.09

[Reserved]

§§ 75.08[Reserved]



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27-75 California Legal Forms--Transaction Guide § 75.10

§ 75.10 Definition of Contract

A contract is an agreement to do or not to do a certain thing [*Civ. Code § 1549*], provided the following necessary elements of a contract are present [*Civ. Code § 1550; but see Yosemite Etc. Corp. v. St. Bd. of Equal. (1943) 59 Cal. App. 2d 39, 41, 138 P.2d 39* (legislature may by statute create particular types of agreements with different rules for their creation, and call them contracts)]:

- Parties capable of contracting [*see § 75.11[1]*];
- Their consent [*see § 75.11[2]*];
- A lawful object [*see § 75.11[3]*]; and
- A sufficient consideration [*see § 75.11[4]*].

A contract creates an obligation [*Civ. Code § 1428*], which is a legal duty by which a party is bound to do or not to do a certain thing [*Civ. Code § 1427*], according to the contract.

Legal Topics:

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

Contracts LawContract Conditions & ProvisionsGeneral OverviewContracts LawFormationGeneral Overview



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27-75 California Legal Forms--Transaction Guide § 75.11

§ 75.11 Contract Elements

[1] Parties

[a] Capacity

For an agreement to be a contract, the parties to the agreement must be capable of contracting [*Civ. Code § 1550*]. All persons are capable of contracting except [*Civ. Code § 1556*]:

- Minors, although they do have a limited capacity to become contractually bound [*Civ. Code § 1557(a)*; see *Fam. Code § 6500 et seq.*; see also Ch. 100B, *Contracts and Employment of Minors*].
- Persons of unsound mind, although they also have a limited capacity to become contractually bound [*Civ. Code § 1557(b)*; see *Civ. Code § 38 et seq.*].
- Persons deprived of civil rights.

There must be at least two parties to a contract [*Luis v. Orcutt Town Water Co. (1962) 204 Cal. App. 2d 433, 444, 22 Cal. Rptr. 389*] .

[b] Identification

For a contract to be valid, it must be possible to identify the parties to that contract [*Civ. Code § 1558*]. This requirement applies mainly to executory contracts [*People v. Bradford (1955) 130 Cal. App. 2d 606, 608, 279 P.2d 561* ; see § 75.12[3]]. Identifying the parties will seldom be an issue in litigation concerning an executed agreement.

[c] Third-Party Beneficiaries

A contract for the benefit of a third person may be enforced by that person at any time before the parties to the contract rescind it, if the contract is expressly for the benefit of that person, known as a third-party beneficiary [*Civ. Code § 1559*]. A third person who is merely an incidental beneficiary of the contract may not enforce it [*Stagen v.*

Stewart-West Coast Title Co. (1983) 149 Cal. App. 3d 114, 119, 196 Cal. Rptr. 732; *Dateline Builders, Inc. v. City of Santa Rosa (1983) 146 Cal. App. 3d 520, 527-528, 194 Cal. Rptr. 258*; see *Spinks v. Equity Residential Briarwood Apartments (2009) 171 Cal. App. 4th 1004, 1025-1030, 90 Cal. Rptr. 3d 453* (record on appeal, after trial court granted defense motion for summary judgment, disclosed existence of triable issue of fact on question of whether plaintiff was intended third-party beneficiary of short-term residential lease between defendant landlord and plaintiff's employer); *Vahle v. Barwick (2001) 93 Cal. App. 4th 1323, 1332, 113 Cal. Rptr. 2d 793* (trial court erred in granting summary judgment to attorney sued for malpractice on basis that she was third party beneficiary of release agreement between plaintiffs and country club; whether defendant was intended beneficiary was triable issue of fact); see also *Benasra v. Marciano (2001) 92 Cal. App. 4th 987, 991-993, 112 Cal. Rptr. 2d 358* (corporate officer who signed licensing agreements providing for arbitration with defendant corporation in representative capacity rather than in individual capacity was not third party beneficiary of contract; officer thus could not be compelled to arbitrate libel action he had brought against other corporation and its president); but see *Performance Plastering v. Richmond Am. Homes of Cal., Inc. (2007) 153 Cal. App. 4th 659, 667, 63 Cal. Rptr. 3d 537* (subcontractor's liability insurer was third-party beneficiary of settlement agreement between contractor and subcontractor for release of "Subcontractor and its insurers" from claims by contractor; therefore, insurer had standing to sue contractor for breach of that agreement)).

A third party beneficiary's rights under a contract are not based on the existence of an actual contractual relationship between the parties, but on the law's recognition that the acts of the contracting parties created a duty and established privity between the promisor and the third party beneficiary with respect to the obligation on which the action is founded. Accordingly, the third party beneficiary's rights under the contract are subject to the conditions imposed therein [*Mercury Casualty Company v. Maloney (2003) 113 Cal. App. 4th 799, 802-803, 6 Cal. Rptr. 3d 647* (injured passenger who received medical payments from driver's excess insurer was obligated to reimburse insurer pursuant to insurance policy provision requiring reimbursement upon settlement with responsible party)].

The parties to the contract may rescind it without the assent of a third-party beneficiary at any time before the contract is accepted, adopted, or acted-on by that third person [Civ. Code § 1559; *James v. Pawsey (1958) 162 Cal. App. 2d 740, 747, 328 P.2d 1023*].

[2] Consent

[a] Free Consent

The consent of the parties to a contract must be free, mutual, and communicated by each party to the other [Civ. Code § 1565]. Consent is not free if it is obtained through any of the following [Civ. Code § 1567; see, e.g., *Jones v. Adams Financial Services (1999) 71 Cal. App. 4th 831, 835-840, 84 Cal. Rptr. 2d 151* (loan documents signed by elderly woman who was blind and suffered from dementia allegedly obtained through fraud in execution without negligence on plaintiff's part); *Crosstalk Productions Inc. v. Jacobson (1998) 65 Cal. App. 4th 631, 644-645, 76 Cal. Rptr. 2d 615* (plaintiffs alleged extortion by CBS employee for "securing" contract for them from CBS)]:

- Duress [see Civ. Code § 1569].
- Menace [see Civ. Code § 1570].
- Actual fraud [see Civ. Code §§ 1571, 1572].
- Constructive fraud [see Civ. Code §§ 1571, 1573].
- Undue influence [see Civ. Code § 1575].
- Mistake of fact [see Civ. Code §§ 1576, 1577].

■ Mistake of law [see *Civ. Code* §§ 1576, 1578; see, e.g., *Harris v. Rudin, Richman & Appel* (2002) 95 Cal. App. 4th 1332, 1338-1341, 116 Cal. Rptr. 2d 552 (reversing summary judgment for plaintiff because defendants raised triable issues of fact as to whether they were entitled to rescind settlement agreement based on mutual mistake of fact or law)].

For further discussion, see California Forms of Pleading and Practice, Ch. 215, *Duress, Menace, Fraud, Undue Influence, and Mistake* (Matthew Bender).

[b] Mutuality of Consent

The consent of the parties to a contract must be mutual [*Civ. Code* § 1565]. Consent is not mutual unless all of the parties agree on the same thing in the same sense [*Civ. Code* § 1580]. Mutual consent generally takes the form of an offer or proposal followed by an acceptance [see, e.g., *Roth v. Malson* (1998) 67 Cal. App. 4th 552, 557-559, 79 Cal. Rptr. 2d 226 (prospective buyer's response to seller's counteroffer was counter-counteroffer rather than acceptance, and no contract was formed); *First Street Plaza Partners v. City of Los Angeles* (1998) 65 Cal. App. 4th 650, 663-664, 667-668, 76 Cal. Rptr. 2d 626 (no contract was formed because requirements of city's charter for formation of contract were not met; city could not be equitably estopped from denying that contract was formed); see also *Grimes v. New Century Mortgage Corporation* (9th Cir. 2003) 340 F.3d 1007, 1010-1011 (essential element of loan contract--rate of interest--was not determined when terms of loan application differed from those in loan documents and agent represented that terms would be corrected; material issues as to existence and terms of contract precluded summary judgment)]].

In determining whether the parties intended to consent, the courts will consider the objective intent of the parties [*Leo F. Piazza Paving Co. v. Bebek & Brkich* (1956) 141 Cal. App. 2d 226, 230, 296 P.2d 368] . That is, the courts will generally look to the outward circumstances in determining consent and not to the subjective intent of the parties [*The Money Store v. Southern California Bank* (2002) 98 Cal. App. 4th 722, 728, 120 Cal. Rptr. 2d 58 (lender's closing instructions to bank exhibited mutual consent); *Weddington Productions, Inc. v. Flick* (1998) 60 Cal. App. 4th 793, 811-812; *Blumenfeld v. R. H. Macy & Co.* (1979) 92 Cal. App. 3d 38, 46, 154 Cal. Rptr. 652; *Estate of Wilson* (1976) 64 Cal. App. 3d 786, 802, 134 Cal. Rptr. 749] . The practical effect of this rule is that when a person with capacity signs a contract, he or she is bound, in the absence of fraud or other imposition, by the contents of that contract. The person may not claim that the provisions of the contract are contrary to his or her intent or understanding [*Palmquist v. Mercer* (1954) 43 Cal. 2d 92, 98, 272 P.2d 26; *Estate of Wilson* (1976) 64 Cal. App. 3d 786, 802, 134 Cal. Rptr. 749] .

[c] Communication of Consent

The consent of the parties to a contract must be communicated by each party to the other [*Civ. Code* § 1565]. Consent can be effectively communicated only by an act or omission of the contracting party by which that party intends to communicate consent or that necessarily tends to communicate consent [*Civ. Code* § 1581]. Any reasonable and usual mode of communicating consent may be used unless the proposal requires otherwise [*Civ. Code* § 1582; see, e.g., *Je Ho Lim v. The.TV Corporation International* (2002) 99 Cal. App. 4th 684, 690-693, 121 Cal. Rptr. 2d 333 (plaintiff adequately pled cause of action for breach of contract with allegations of Internet offer of domain name at auction, e-mail submission of highest bid, and subsequent e-mail invoice for domain registration)]. Consent to a written contract may be communicated in various ways, such as any of the following:

■ Signing the contract [*Banner Entertainment v. Superior Court* (1998) 62 Cal. App. 4th 348, 357-358, 72 Cal. Rptr. 2d 598 (no agreement to arbitrate was made when preliminary draft agreements, which provided that plaintiff would agree to terms with signature, were never signed); *Patty v. Berryman* (1949) 95 Cal. App. 2d 159, 166, 212 P.2d 937; see *Lamle v. Mattel, Inc.* (Fed. Cir. 2005)

394 F.3d 1355, 1359-1360 (applying substantive contract law of California to hold that genuine issue of material fact existed as to formation of contract); see also § 75.17 (electronic contracts and signatures)].

■ Exchanging a formal offer and the acceptance [*Schreiber v. Hooker* (1952) 114 Cal. App. 2d 634, 637-640, 251 P.2d 55] .

■ Receiving and accepting a contract signed by the other [*Dallman Supply Co. v. Smith-Blair, Inc.* (1951) 103 Cal. App. 2d 129, 132, 228 P.2d 886] .

Consent is deemed to be fully communicated between the parties when the accepting party puts the acceptance in the course of transmission to the proposer [Civ. Code § 1583]. This rule requires that the acceptance, to be considered "in the course of transmission," must be placed beyond the control of the accepting party [*Ivey v. Kern County Land Co.* (1896) 115 Cal. 196, 201, 46 P. 926] . Typically, an acceptance is beyond the control of the accepting party when it is deposited in the mail [*Palo Alto Town & Country Village, Inc. v. BBTC Company* (1974) 11 Cal. 3d 494, 500-501, 113 Cal. Rptr. 705, 521 P.2d 1097] . Because a written acceptance given to an office mail clerk with instructions to deliver it to the post office is not beyond the accepting person's control, such an acceptance does not become effective until deposited in the mail at the post office [*Gibbs v. American Savings & Loan Assn.* (1990) 217 Cal. App. 3d 1372, 1376, 266 Cal. Rptr. 517] .

[d] Conditional Proposal

If a contract proposal sets any conditions for the communication of acceptance, then those conditions must be complied with, otherwise the proposing party is not bound [Civ. Code § 1582]. Performance of the conditions of a proposal or the acceptance of the consideration offered with a proposal is an acceptance of that proposal [Civ. Code § 1584].

[e] Qualified Acceptance

A consent or acceptance must be absolute and unqualified, or else it must include in itself an acceptance of that character, which the proposing party can separate from the rest and which will conclude the person accepting [Civ. Code § 1585]. A qualified acceptance is not an acceptance at all, but a new proposal [Civ. Code § 1585].

[f] Acceptance of Benefits or Consideration

Acceptance of the consideration offered with a proposal constitutes an acceptance of that proposal [Civ. Code § 1584]. In addition, a voluntary acceptance of the benefit of a transaction is equivalent to a consent to all of the obligations arising from it, insofar as the facts are known, or ought to be known, to the one accepting the benefits [Civ. Code § 1589; see *Melchior v. New Line Productions, Inc.* (2003) 106 Cal. App. 4th 779, 788-790, 131 Cal. Rptr. 2d 347 (assignee of film production company, which accepted benefits of company's original agreement with author, also accepted obligations of original agreement despite different terms in assignment agreement); *Saret-Cook v. Gilbert, Kelly, Crowley & Jennett* (1999) 74 Cal. App. 4th 1211, 1225-1227, 88 Cal. Rptr. 2d 732 (even if plaintiff lacked contractual capacity at time of executing settlement agreement, she both ratified contract and accepted benefits under agreement); *Recorded Picture Co. v. Nelson Entertainment* (1997) 53 Cal. App. 4th 350, 361-363, 61 Cal. Rptr. 2d 742] . This does not include the voluntary and unsolicited sending or providing of goods or services, which are deemed an unconditional gift to the recipient [Civ. Code § 1584.5].

[g] New Contract Terms Posted on Web Site

The terms of a consumer service contract could be posted on the service provider's web site, and that posting could be the only source to which a customer can refer for those terms. If the service provider posts revised terms on the web site, an issue might arise as to whether a court should enforce the modified contract against an existing customer. Such a party has no obligation to check the terms of the contract on a periodic basis in order to learn whether they have been

changed by the service provider. Indeed, the customer could not know when to check the web site for possible changes to the contract terms without being notified as to how the contract has been changed. Even if the customer checked the contract every day for possible changes, still, without such notice, an examination would be fairly cumbersome, as the customer would have to compare every word of the posted contract with the existing contract in order to detect whether it had changed. It is elementary that a party cannot unilaterally change the terms of a contract but must obtain the other party's consent to do so. Presenting a revised contract amounts to nothing more than making an offer and does not bind the other party until it is accepted. Generally an offeree cannot actually assent to an offer unless the offeree knows of its existence. Even if the customer's continued use of the provided service could be considered assent, such assent can be inferred only after the customer has received proper notice of the proposed changes [*Douglas v. U.S. Dist. Court (Talk America, Inc.)* (9th Cir. 2007) 495 F.3d 1062, 1066] , *cert. denied*, *Talk Am., Inc. v. Douglas*, 128 S. Ct. 1472, 170 L. Ed. 2d 296 (2007) .

[3] Object of Contract

[a] Legality of Object

The object of a contract must be lawful [Civ. Code § 1550]. The "object of a contract" is what the party receiving the consideration has agreed to do or not to do [Civ. Code § 1595]. The object must be lawful when the contract is made, and must be possible and ascertainable by the time the contract is to be performed [Civ. Code § 1596].

The object of a contract is illegal if contrary to an express provision of law, contrary to the policy of express law, or otherwise contrary to good morals [Civ. Code § 1667]. Contracts held to be illegal for this reason include the following:

- An agreement by which an heir hunter, not licensed to practice law, obtained an assignment authorizing the heir hunter to select and pay for an attorney and to control litigation involving the inheritance in question [*Estate of Molino* (2008) 165 Cal. App. 4th 913, 923, 81 Cal. Rptr. 3d 512 (void as against public policy)];
- An agreement for the establishment of a plant in Iran to manufacture computer products to be sold in Iran [*Kashani v. Tsann Kuen China Enterprise, Ltd.* (2004) 118 Cal. App. 4th 531, 537, 13 Cal. Rptr. 3d 174 (unenforceable as illegal and against public policy because it violated U.S. presidential executive orders and implementing regulations excluding U.S. persons from transactions relating to supply of technology to Iran)];
- A contract between spouses providing for liquidated damages for infidelity [*Diosdado v. Diosdado* (2002) 97 Cal. App. 4th 470, 474, 118 Cal. Rptr. 2d 494 (contrary to public policy underlying no-fault provisions for dissolution of marriage)];
- A sperm bank's agreement with potential parents precluding disclosure of a donor's identity and other information under all circumstances [*Johnson v. Superior Court* (2000) 80 Cal. App. 4th 1050, 1065-1067, 95 Cal. Rptr. 2d 864 (contrary to public policy and unenforceable, as Fam. Code § 7613 permits disclosure of insemination records under certain circumstances); *but see Dunkin v. Boskey* (2000) 82 Cal. App. 4th 171, 189-190, 98 Cal. Rptr. 2d 44 (agreement by unmarried couple to grant male partner paternity rights to child conceived by artificial insemination was not against public policy, and served rather than contravened family law policies to legitimate children and provide for their support)].

All contracts that have for their object, directly or indirectly, to exempt anyone from responsibility for the person's own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law [Civ. Code § 1668; *Manderville v. PCG&S Group, Inc.* (2007) 146 Cal. App. 4th 1486, 1501-1502, 55 Cal. Rptr. 3d 59 ; *but see Farnham v. Superior Court* (1997) 60 Cal. App. 4th 69, 77-78, 70 Cal. Rptr.

2d 85 (hybrid contractual waiver in employment agreement that preserved employee's claims against corporate employer but waived right to sue officers, directors, and shareholders for damages arising out of employment agreement was not unenforceable for illegality under *Civ. Code* § 1668; contractual provision was result of private, voluntary transaction in which employee retained right to seek redress from corporation itself)]. Contracts held to be illegal for this reason include the following:

- A contract clause prohibiting any recovery of damages (but not equitable relief) for any violation of statutory or regulatory law not made part of the parties' contractual obligations [*Health Net of California, Inc. v. Department of Health Services* (2003) 113 Cal. App. 4th 224, 226-227, 6 Cal. Rptr. 3d 235] ;
- An agreement exculpating a child-care provider from its own negligence [*Gavin W. v. YMCA of Metropolitan Los Angeles* (2003) 106 Cal. App. 4th 662, 671-674, 131 Cal. Rptr. 2d 168] ;
- A confidentiality clause in a settlement agreement that prohibited a securities dealer's customer from discussing the dealer's misconduct with regulatory authorities [*Cariveau v. Halferty* (2000) 83 Cal. App. 4th 126, 138, 99 Cal. Rptr. 2d 417 (void and unenforceable as violation of public policy set forth in securities laws and regulations)].

If a contract has but one object, and that object is illegal, then the contract is void even if the object is only illegal in part. If that one object is entirely impossible to perform, or wholly unascertainable, the contract is void [*Civ. Code* § 1598]. If a contract has several distinct objects, then any of these objects that is lawful is valid, despite the illegality of the other objects [*Civ. Code* § 1599; see, e.g., *Birbrower, Montalbano, Condon & Frank v. Superior Court* (1998) 17 Cal. 4th 119, 137-140, 140, 70 Cal. Rptr. 2d 304, 949 P.2d 1 (attorney fee agreement was not entirely unenforceable because of New York law firm's unauthorized practice of law in California; statutory violation did not preclude recovery under agreement for limited services performed outside California)].

A contract that has a lawful object but is drafted by one party so as to result in an unlawful incidental benefit for that party (such as an illegal income tax advantage) nevertheless may be enforceable by the other party, as long as the other party was not *in pari delicto* in the structuring of the transaction with that unlawful motive [*Maudlin v. Pacific Decision Sciences Corp.* (2006) 137 Cal. App. 4th 1001, 1014-1015, 40 Cal. Rptr. 3d 724 (contract for redemption of shareholder's stock in close corporation, which was lawful object, was enforceable by shareholder who was not *in pari delicto* with corporation in structuring transaction so as to achieve illegal income tax advantage for corporation)].

[b] Contracts Contrary to Good Morals

Whether a contract is against public policy because it is "otherwise contrary to good morals" [*Civ. Code* § 1667(3)] may be difficult to determine. One example of an illegal contract that violates public policy without being contrary to any express law or the policy of any express law is a contract that includes as part of its consideration the nondisclosure of discreditable facts [*Allen v. Jordanos', Inc.* (1975) 52 Cal. App. 3d 160, 166, 125 Cal. Rptr. 31 ; *Brown v. Freese* (1938) 28 Cal. App. 2d 608, 618, 83 P.2d 82] . A contract by an officer that interferes with the unbiased discharge of that officer's duty to the public is contrary to good morals; thus, a contract between a police chief and his prisoner for the chief to buy the prisoner's home was against public policy and void [*Grimes v. Allen* (1949) 93 Cal. App. 2d 653, 656-657, 209 P.2d 651] .

[4] Consideration

[a] Requirement

A contract must have a sufficient consideration [*Civ. Code* § 1550; see, e.g., *O'Byrne v. Santa Monica-UCLA Medical*

Center (2001) 94 Cal. App. 4th 797, 808-810, 114 Cal. Rptr. 2d 575 (no consideration was given for medical staff bylaws adopted pursuant to 22 Cal. Code Reg. § 70703; thus bylaws did not in and of themselves constitute a contract between hospital and a physician on its medical staff)], because a promise unsupported by consideration has no binding force [*Torlai v. Lee* (1969) 270 Cal. App. 2d 854, 858-859, 76 Cal. Rptr. 239] . This requirement applies only to executory contracts [see § 75.12[3]]. When a contract has been fully performed on both sides, the question of consideration is immaterial [*Schiffman v. Atlas Mill Supply, Inc.* (1961) 193 Cal. App. 2d 847, 851-853, 14 Cal. Rptr. 708] . Gifts and other voluntary transfers, once completed, do not require consideration in order to be valid [Civ. Code §§ 1040, 1146]. A promise to make a gift is unenforceable, however, unless supported by consideration [*Burke v. Bank of America etc. Assn.* (1939) 34 Cal. App. 2d 594, 597, 94 P.2d 58] .

[b] Statutory Exceptions

Some contracts are exempted by statute from the consideration requirement. Examples include the following:

- A written release of a debtor [Civ. Code § 1541].
- A written acceptance of part performance in satisfaction of an obligation [Civ. Code § 1524].
- A written modification of an oral contract [Civ. Code § 1697].
- The authorization of an agent [Civ. Code § 2308].
- Some surety obligations [Civ. Code §§ 2792, 2793; see Ch. 79, *Suretyship, Guaranty, and Indemnity*].

In the case of a property, support, or separation agreement entered into by a husband and wife, the mutual consent of the parties to the agreement is a sufficient consideration [Fam. Code § 3580; see Fam. Code §§ 3580 et seq., 3651].

[c] Definition

Any benefit conferred or agreed to be conferred on a promisor by another is good consideration for the promise, if the promisor was not lawfully entitled to that benefit. Any detriment that another suffers or agrees to suffer as an inducement to the promisor is good consideration for a promise, if the other was not already legally bound to suffer the detriment at the time of consent [Civ. Code § 1605; see *Kremen v. Cohen* (9th Cir. 2003) 337 F.3d 1024, 1028-1029 (registrar of Internet domain name did not breach implied contract with registrant by assigning name to another party; no consideration was given for registration)]. Consideration includes any act or return promise that was bargained for and given in exchange for a promise giving a benefit to the promisor or imposing a detriment on the promisee [*Peterson Tractor Co. v. State Board of Equalization* (1962) 199 Cal. App. 2d 662, 670, 18 Cal. Rptr. 800] .

The benefit or detriment must be part of a bargain or agreed exchange. The mere fact that a promisee relies on a promise to his or her injury or the promisor gains some advantage does not establish consideration without the element of a bargain or agreed exchange [*Enslow v. Von Guenther* (1961) 193 Cal. App. 2d 318, 322-323, 14 Cal. Rptr. 231] .

Examples of consideration are:

- The compromise of a disputed, good faith claim [*Goldstone-Tobias Agency, Inc. v. Barbroo Enterprises Productions, Inc.* (1965) 237 Cal. App. 2d 720, 722, 47 Cal. Rptr. 347] .
- The sale or assignment of property to extinguish a preexisting debt, if the debt is not disproportionately small in comparison with the value of the transferred property [Civ. Code §§ 3439.03,

3439.04; *Pope v. National Aero Finance Co.* (1965) 236 Cal. App. 2d 722, 729, 46 Cal. Rptr. 233] .

- An agreement to forgo an enforceable legal right [*World Sav. & Loan Asso. v. Kurtz Co.* (1960) 183 Cal. App. 2d 319, 327, 6 Cal. Rptr. 665 ; see *King v. Tilden Park Estates* (1958) 156 Cal. App. 2d 824, 832, 320 P.2d 109] .

- An agreement to forebear to sue or to pursue some other legal remedy [*E-P Constructors, Inc. v. Peterson Tractor Co.* (1961) 192 Cal. App. 2d 518, 524-525, 13 Cal. Rptr. 569] .

When based on an actual agreement, forbearance to sue may be a sufficient consideration even though the underlying claim is ill-founded [*Healy v. Brewster* (1967) 251 Cal. App. 2d 541, 551, 59 Cal. Rptr. 752] . The promise to forbear may be implicit or explicit, and the act of forbearance itself is evidence of an agreement to forbear [*Levine v. Tobin* (1962) 210 Cal. App. 2d 67, 69-71, 26 Cal. Rptr. 273] .

[d] Existing Legal or Moral Obligation

An existing legal obligation of the promisor is a good consideration for a promise, as is a moral obligation originating in a benefit conferred on the promisor or a detriment suffered by the promisee. However, each of these is good consideration only to the extent of the obligation [Civ. Code § 1606]. Thus an antecedent debt barred by the statute of limitations is sufficient consideration for a promise to pay that debt but is not good consideration for a promise to pay the debt of any other person [*Leonard v. Gallagher* (1965) 235 Cal. App. 2d 362, 372-374, 45 Cal. Rptr. 211] .

A moral obligation, however, is legally unenforceable. When there is no expectation of payment by either party at the time services are rendered, a promise by the party receiving the services to pay the performing party is a mere promise to make a gift and is not enforceable [*Passante v. McWilliam* (1997) 53 Cal. App. 4th 1240, 1248-1249, 62 Cal. Rptr. 2d 298 (no consideration for directors' oral promise to provide corporation's attorney with stock interest in return for arranging financing when loan was arranged before stock was promised)].

[e] Mutual Promises

A promise is good consideration for a return promise [*Porporato v. Devincenzi* (1968) 261 Cal. App. 2d 670, 675, 68 Cal. Rptr. 210] . However, in order for this exchange of promises to create a bilateral contract, the promises must be mutual in obligation. That is, both parties must assume some legal obligation. If one of the promises leaves a party free to perform or to withdraw at will, then that promise is illusory and provides no consideration [*Mattei v. Hopper* (1958) 51 Cal. 2d 119, 122, 330 P.2d 625] . If one party fails to do what he or she has promised, then that failure to perform as promised is a failure of consideration, and the other party's promise is no longer binding, because it is a promise not supported by consideration [*Coleman v. Mora* (1968) 263 Cal. App. 2d 137, 150, 69 Cal. Rptr. 166] .

[f] Value and Sufficiency

"Good consideration" means a valuable consideration [*Horton v. Kyburz* (1959) 53 Cal. 2d 59, 65, 346 P.2d 399] . Although a good and sufficient consideration must be a valuable consideration, it need not be an adequate consideration. The law will not attempt to weigh the market value of the consideration against that of the promise [see *Horton v. Kyburz* (1959) 53 Cal. 2d 59, 66, 346 P.2d 399] . However, a contract is not specifically enforceable unless supported by adequate consideration, because specific performance is available only if the contract is fair and just and its enforcement is equitable [Civ. Code § 3391; *Schwartz v. Shapiro* (1964) 229 Cal. App. 2d 238, 255, 40 Cal. Rptr. 189] .

A written contract is presumptive evidence of consideration [Civ. Code § 1614]. This presumption may be rebutted by evidence that shows a lack of consideration [*Glickman v. Collins* (1975) 13 Cal. 3d 852, 861, 120 Cal. Rptr. 76, 533

P.2d 204] .

[g] Legality

The consideration for a contract must be lawful within the meaning of *Civ. Code* § 1667 [*Civ. Code* § 1607; see § 75.11[3][a]]. If any part of a single consideration for one or more objects, or of several considerations for a single object, is illegal, then the contract is void [*Civ. Code* § 1608].

[h] Amount Uncertain

If a consideration is executory [see § 75.12[3]], then it is not necessary that the contract specify the amount of the consideration or the method of determining it. The amount or method may be left to the decision of a third party or regulated by any specified standard [*Civ. Code* § 1610]. If a contract fixes neither the amount of the consideration nor the method for determining it, or if a contract leaves the amount of the consideration to the discretion of an interested party, then the consideration must be so much money as the object of the contract is reasonably worth [*Civ. Code* § 1611].

[i] Impossibility of Determination

If the contract provides an exclusive method for ascertaining its consideration, the contract is void if that method is impossible on its face [*Civ. Code* § 1612]. If the exclusive method of ascertainment appears possible on its face but is in fact impossible or becomes impossible, then only the provision setting the method of ascertainment is void [*Civ. Code* § 1613].

[j] Promissory Estoppel as Substitute for Consideration

A promise is binding and enforceable without consideration if the following four conditions are satisfied [*C & K Engineering Contractors v. Amber Steel Co.* (1978) 23 Cal. 3d 1, 6, 151 Cal. Rptr. 323, 587 P.2d 1136 ; *Youngman v. Nevada Irrigation Dist.* (1969) 70 Cal. 2d 240, 249, 74 Cal. Rptr. 398, 449 P.2d 462 ; *Drennan v. Star Paving Co.* (1958) 51 Cal. 2d 409, 413, 333 P.2d 757 ; *US Ecology, Inc. v. State* (2005) 129 Cal. App. 4th 887, 891, 908, 28 Cal. Rptr. 3d 894 (plaintiff must prove that defendant's breach was substantial factor in causing plaintiff's injury)]:

- The promise must be one that the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee.
- The promise must induce this action or forbearance.
- The promisor's breach of the promise must have been a substantial factor in causing injury to the promisee.
- Injustice could be avoided only by enforcement of the promise.

If the promisee's reliance was bargained for, then the law of consideration governs, and this doctrine of promissory estoppel is inapplicable [*Youngman v. Nevada Irrigation Dist.* (1969) 70 Cal. 2d 240, 249, 74 Cal. Rptr. 398, 449 P.2d 462 ; *Healy v. Brewster* (1963) 59 Cal. 2d 455, 463, 30 Cal. Rptr. 129, 380 P.2d 817] . Promissory estoppel also is inapplicable when there is no promise of sufficient definitiveness and clarity [see *Lange v. TIG Insurance Company* (1998) 68 Cal. App. 4th 1179, 1185-1187, 81 Cal. Rptr. 2d 39] .

Legal Topics:

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

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§ 75.12 Contract Types

[1] Express and Implied Contracts

A contract is either express or implied [*Civ. Code § 1619*]. An express contract has terms stated in words [*Civ. Code § 1620*]. An implied contract is one whose existence and terms are manifested by conduct [*Civ. Code § 1620*; *see, e.g., Mitsui O.S.K. Lines, Ltd. (1999) 72 Cal. App. 4th 208, 212-213, 85 Cal. Rptr. 2d 1* (implied contract is evidenced in part or whole by parties' conduct rather than express exchange of promises; facts did not support inference of implied agreement that defendant would pay freight for shipment)]. This chapter concerns express contracts. For discussion of implied contracts, see California Forms of Pleading and Practice, Ch. 140, *Contracts* (Matthew Bender), and California Points and Authorities, Ch. 50, *Contracts* (Matthew Bender).

[2] Bilateral and Unilateral Contracts

A bilateral contract exists when parties to an agreement exchange mutual promises [*Davis v. Jacoby (1934) 1 Cal. 2d 370, 378, 34 P.2d 1026*] (and the other requirements for a contract are met). If there is room for doubt, it is presumed that an offer is an offer for a bilateral contract, which may be accepted by a promise in return [*Davis v. Jacoby (1934) 1 Cal. 2d 370, 378-379, 34 P.2d 1026*] .

A unilateral contract is formed when one party has made an offer that can be accepted only by some kind of performance, and the other party has so performed [*Civ. Code § 1584* (performance of conditions of offer is acceptance of offer); *Davis v. Jacoby (1934) 1 Cal. 2d 370, 378, 34 P.2d 1026*] . For example, if A offers to pay \$20 to B if B will mow A's lawn, a unilateral contract is formed when B mows the lawn with the intent of collecting the \$20; and thereupon A becomes contractually obligated to pay \$20 to B.

[3] Executed and Executory Contracts

An executed contract is one whose object has been fully performed. All other contracts are "executory" [*Civ. Code § 1661*]. This distinction can be important in several areas. For example, a written contract can be altered only by another written contract or by an oral contract that is fully executed [*Civ. Code § 1698*]. Moreover, the statute of frauds [*see § 75.14*] does not apply to executed agreements [*Pollyanna Homes, Inc. v. Berney (1961) 56 Cal. 2d 676, 678-679, 16*

Cal. Rptr. 345, 365 P.2d 401 . Other affected areas may be identification of parties [see § 75.11[1][b]], consideration [*Julian v. Gold* (1931) 214 Cal. 74, 76, 3 P.2d 1009] , and illegality [*National Stone Tile Corp. v. Voorheis* (1928) 93 Cal. App. 738, 743, 270 P. 286] .

Legal Topics:

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

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§ 75.13 Options

[1] Nature of Option

A binding option agreement is a contract to keep an offer open for a specified period. The option agreement must be supported by consideration; otherwise, it is not binding, and the offer may be revoked [*Civ. Code § 1586; Palo Alto Town & Country Village, Inc. v. BBTC Company* (1974) 11 Cal. 3d 494, 502, 113 Cal. Rptr. 705, 521 P.2d 1097 ; see [2], below].

From the optionor's point of view, the option is a unilateral promise [see § 75.12[2]] to perform [*Palo Alto Town & Country Village, Inc. v. BBTC Company* (1974) 11 Cal. 3d 494, 502, 113 Cal. Rptr. 705, 521 P.2d 1097 ; *Warner Bros. Pictures v. Brodel* (1948) 31 Cal. 2d 766, 772-773, 192 P.2d 949] , and the promise becomes a binding contract on the optionee's exercise of the option in accordance with its terms [*Adams v. Williams Resorts, Inc.* (1962) 210 Cal. App. 2d 456, 462, 26 Cal. Rptr. 656 ; see [4], below]. The optionor cannot defeat the optionee's rights by attempting to repudiate the option [*Caras v. Parker* (1957) 149 Cal. App. 2d 621, 627, 309 P.2d 104] .

From the optionee's point of view, the option is an irrevocable offer that he or she can convert into a binding contract by exercise of the option [*Palo Alto Town & Country Village, Inc. v. BBTC Company* (1974) 11 Cal. 3d 494, 502, 113 Cal. Rptr. 705, 521 P.2d 1097 ; *Warner Bros. Pictures v. Brodel* (1948) 31 Cal. 2d 766, 772-773, 192 P.2d 949] .

[2] Consideration Requirement

An option agreement that is not supported by consideration is not a binding contract but is merely an offer, which may be revoked at any time before acceptance [*Civ. Code § 1586; Henry v. Lake Mill Lumber Co.* (1956) 139 Cal. App. 2d 620, 622, 293 P.2d 909] . Even if the agreement recites that the option was given for consideration received, the option is not binding unless actual consideration was given. A recital merely creates a presumption of consideration, and that presumption may be rebutted [*Kelley v. Rouse* (1961) 188 Cal. App. 2d 92, 96-100, 10 Cal. Rptr. 235] . However, even an option not supported by consideration is binding once exercised [see *Civ. Code § 1586* (offer may not be revoked after acceptance communicated to offeror); *Torlai v. Lee* (1969) 270 Cal. App. 2d 854, 858, 76 Cal. Rptr. 239] .

No particular amount of consideration is necessary to make an option binding. An option given for any valuable consideration, however small, is irrevocable for the period specified and cannot be terminated without the consent of the optionee [*Wheat v. Morse* (1961) 197 Cal. App. 2d 203, 206, 17 Cal. Rptr. 226] .

[3] Duration of Option

An option that is supported by consideration is irrevocable for the period stated in the option [*Wheat v. Morse* (1961) 197 Cal. App. 2d 203, 206, 17 Cal. Rptr. 226] . If the option is not exercised within the time specified, the optionee's rights under the agreement cease [*Drewry v. Welch* (1965) 236 Cal. App. 2d 159, 167, 46 Cal. Rptr. 65] . Time is of the essence [*Murfee v. Porter* (1950) 96 Cal. App. 2d 9, 18, 214 P.2d 543] . If the option does not specify a term, then it must be exercised within a reasonable period [*Auslen v. Johnson* (1953) 118 Cal. App. 2d 319, 322, 257 P.2d 664 ; Civ. Code § 1587 (proposal is revoked by lapse of reasonable time without communication of acceptance)].

A recorded instrument that creates or gives constructive notice of an option to buy real property is subject to an added limitation. If the option does not set an expiration date, then the recorded instrument expires of record six months after being recorded [Civ. Code § 884.010(b)]. This does not affect the time within which the option must be exercised, but it does mean that the recorded instrument no longer puts third persons on notice of the option [Civ. Code § 884.020].

An offer of an option is an offer to contract and, like any other such offer, is subject to the provisions of Civ. Code §§ 1582 and 1583 on the communication of the acceptance of an offer [*Palo Alto Town & Country Village, Inc. v. BBTC Company* (1974) 11 Cal. 3d 494, 501, 113 Cal. Rptr. 705, 521 P.2d 1097 ; *Dawson v. Goff* (1954) 43 Cal. 2d 310, 316, 273 P.2d 1] . This means that the exercise of an option by notice of acceptance is effective on deposit in the mail [Civ. Code § 1583] rather than on receipt by the optionor [*Palo Alto Town & Country Village, Inc. v. BBTC Company* (1974) 11 Cal. 3d 494, 500-502, 113 Cal. Rptr. 705, 521 P.2d 1097] .

The period set for the duration of an option merely limits the time for exercise of the option. Unless the option sets a time limit for performance, the optionee may make payment or tender within a reasonable time after exercise, as long as the exercise is within the time set. The rule that time is of the essence of an option applies to exercise, but not to performance [*Murfee v. Porter* (1950) 96 Cal. App. 2d 9, 16-19, 214 P.2d 543] .

[4] Exercise of Option

An option may be exercised at any time before its expiration [see [3], above], by giving notice in the manner required by the option agreement. If no means of acceptance is prescribed, the optionee may accept by any act or course of conduct that indicates to the optionor the optionee's intent to exercise the option [*Cicinelli v. Iwasaki* (1959) 170 Cal. App. 2d 58, 68, 338 P.2d 1005 ; see Civ. Code § 1581 (acceptance of proposal can be communicated by act or omission by which party intends to communicate acceptance or by act or omission that necessarily tends to communicate acceptance)]. If the option is exercised before the earliest time set in the option agreement, the acceptance of the underlying offer will be treated as a continuing acceptance that becomes effective at the time set for the exercise of the option [*Kaneko v. Okuda* (1961) 195 Cal. App. 2d 217, 234, 15 Cal. Rptr. 792] .

If a manner of acceptance is prescribed in the option agreement, then the option must be exercised in that manner [*Landberg v. Landberg* (1972) 24 Cal. App. 3d 742, 752-758, 101 Cal. Rptr. 335] . The acceptance must conform to the offer, adding no new terms or conditions. If new terms or conditions are added, the attempted exercise is considered a rejection and a counteroffer [*Landberg v. Landberg* (1972) 24 Cal. App. 3d 742, 752, 101 Cal. Rptr. 335] . Although a specified manner of exercise must be followed, the vague phrase "by giving notice" does not set a condition of actual receipt of notice [*Palo Alto Town & Country Village, Inc. v. BBTC Company* (1974) 11 Cal. 3d 494, 498-499, 113 Cal. Rptr. 705, 521 P.2d 1097] .

Legal Topics:

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§ 75.14 Statute of Frauds

[1] Contracts Required to Be Written

All contracts may be oral except those specially required by statute to be in writing [*Civ. Code § 1622*]. The primary statute requiring contracts to be in writing, known as the statute of frauds, provides that certain contracts are invalid unless the contract, or a note or memorandum of that contract, is in writing and is signed by the party to be charged or by that party's agent [*Civ. Code §§ 1624, 1624.5*].

An agreement that by its terms is not to be performed within a year of its making must be in writing [*Civ. Code § 1624(a)(1)*]. This rule applies only if the contract, by its terms, cannot possibly be performed within one year [*White Lighting Co. v. Wolfson* (1968) 68 Cal. 2d 336, 343, 66 Cal. Rptr. 697, 438 P.2d 345] . For example, an agreement that granted a beer distributorship for as long as the distributor used his best efforts to promote and sell the beer did not have to be written because its terms did not show that the contract would be impossible to perform within one year. The distributor might fail to use his best efforts at any time, including the first year, and thus the contract might terminate within the first year [*Burgermeister Brewing Corp. v. Bowman* (1964) 227 Cal. App. 2d 274, 281, 38 Cal. Rptr. 597 ; see Ch. 85, *Employment Agreements*].

In addition, the following contracts are required to be in writing:

- A special promise to answer for the debt, default, or miscarriage of another [*Civ. Code § 1624(a)(2)*; see *Civ. Code § 2794* (suretyship obligations that need not be in writing)].
- A real property lease for a period of more than one year or an agreement for the sale of real property or an interest in real property [*Civ. Code § 1624(a)(3)*; see *Bed, Bath & Beyond v. La Jolla Village Square Venture Partners* (1997) 52 Cal. App. 4th 867, 875-877, 60 Cal. Rptr. 2d 830 (agreement to lease real property for term exceeding one year is within *Civ. Code § 1624* regardless of whether agreement provides that it may be canceled or terminated within one year of date of its making and before beginning of lease term)]; provided, if an agreement of this type is made by an agent of the party to be charged, the agreement is invalid unless the agent's authority is in writing, signed by the party to be

charged [*Civ. Code § 1624(a)(3)*].

- An agreement authorizing or employing an agent, broker, or other person, for a compensation or a commission, to buy or sell real estate, or to lease real estate for a period of more than one year, or to procure, introduce, or find a buyer or seller of real estate or a lessee or lessor on such a lease [*Civ. Code § 1624(a)(4)*].

- An agreement that by its terms is not to be performed during the lifetime of the promisor [*Civ. Code § 1624(a)(5)*].

- An agreement by a buyer of real estate to pay a debt secured by a mortgage or deed of trust on the property purchased, unless assumption of the debt by the buyer is specifically provided for in the conveyance of the property [*Civ. Code § 1624(a)(6)*].

A contract, promise, undertaking, or commitment to lend money or to grant or extend credit, in an amount greater than \$100,000, made by a person engaged in the business of lending or arranging for the lending of money or extending credit, must be in writing. This requirement does not apply, however, to transactions primarily for personal, family, or household purposes. Contracts, promises, undertakings, or commitments to lend money secured solely by residential property consisting of one to four dwelling units are considered to be made for personal, family, or household purposes [*Civ. Code § 1624(a)(7)*].

A contract for the sale of personal property over \$5,000 is not enforceable unless there is some record [*see Civ. Code § 1633.2* ("record" defined)] that indicates that there is contract for sale at a defined or stated price that reasonably identifies the subject matter and is signed by the party (or the party's agent) against whom enforcement is sought [*Civ. Code § 1624.5(a)*]. Exceptions to this requirement include:

- Contracts governed by the Commercial Code [*Civ. Code § 1624.5(b)*; *see Com. Code § 2201* (contracts for sale of goods); *Com. Code § 8113* (contracts for sale of securities), *Com. Code §§ 9201, 9202* (security agreements)].

- Specified "qualified financial contracts" [*see Civ. Code § 1624.5(c)*].

Other California statutes also require contracts to be in writing. For example, Division 2 of the California Commercial Code requires contracts for the sale of goods to be in writing if the goods have a price of \$500 or more [*Com. Code § 2201(1)*; *see Com. Code § 2201(3), (4)* (exceptions)]. Division 10 of the California Commercial Code requires certain contracts for the leasing of personal property to be in writing [*see Com. Code § 10201*]. Other provisions requiring a written contract include *Com. Code § 9203* (enforceability of security interests) and *Code Civ. Proc. § 1281* (agreement to arbitrate).

Contracts formed or signed in electronic format are governed by special rules, set out in the Uniform Electronic Transactions Act (UETA) [*see Civ. Code § 1633.1 et seq.*] and the federal Electronic Signatures in Global and National Commerce (E-SIGN) Act [*15 U.S.C. §§ 7001 et seq., 7021, 7031*]. For discussion of these laws, *see § 75.17*.

[2] Effect of Invalidity

If a contract covered by the statute of frauds is not in writing, the contract is "invalid" [*Civ. Code § 1624*; *see Civ. Code § 1624.5(a)* (contracts for sale of personal property over \$5,000 generally not "enforceable" absent "some record" indicating agreement)]. The invalid contract is not void, but the statute of frauds is a defense to enforcement of the contract [*Mangini v. Wolfschmidt, Ltd. (1961) 192 Cal. App. 2d 64, 72, 13 Cal. Rptr. 503*]. This defense must be raised, or it will be considered waived [*Bank of America v. Hutchinson (1963) 212 Cal. App. 2d 142, 149, 27 Cal.*

Rptr. 787] .

Even when a contract is within the statute of frauds, the contract, or part of it, may be enforceable. If the contract is severable, then only the part that clearly falls within the statute of frauds is unenforceable [*White Lighting Co. v. Wolfson* (1968) 68 Cal. 2d 336, 345, 66 Cal. Rptr. 697, 438 P.2d 345 ; *Pollyanna Homes, Inc. v. Berney* (1961) 56 Cal. 2d 676, 678, 16 Cal. Rptr. 345, 365 P.2d 401] . In addition, the statute may not be used to attack a fully executed contract [see § 75.12[3]], because the statute is merely a defense to enforcement. For further discussion, see California Forms of Pleading and Practice, Ch. 530, *Statute of Frauds* (Matthew Bender).

[3] Fraud

A special rule applies when a party to a contract resorts to fraud to prevent that contract from being written down. Even though the contract is within the statute of frauds, any other party to the contract may enforce it if two conditions are satisfied. First, the party seeking enforcement must have been led by the fraud to believe that the contract was in writing. Second, the party seeking enforcement must have acted on that belief to his or her prejudice [*Civ. Code* § 1623].

[4] Estoppel

The doctrine of estoppel precludes reliance on the statute of frauds as a defense under certain circumstances if fraud would result from the failure to enforce an oral contract. The doctrine is applied if one party has significantly changed its position in reliance on the other's promise, and if one of two additional factors is present: either the promisee would suffer unconscionable injury because of that reliance, or the promisor would be unjustly enriched if the contract were not enforced. In many cases, both unconscionable injury and unjust enrichment are present [*Monarco v. Lo Greco* (1950) 35 Cal. 2d 621, 623-624, 220 P.2d 737 ; see *Byrne v. Laura* (1997) 52 Cal. App. 4th 1054, 1068-1069, 60 Cal. Rptr. 2d 908 (finding reliance on representations to be classic case for applying equitable estoppel doctrine)].

Legal Topics:

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

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§ 75.15 Interpretation of Contracts

[1] Intent of the Parties

In California, all contracts, both public and private, are interpreted by the same rules, except as otherwise provided in the Civil Code [Civ. Code § 1635].

The basic principle is that a contract must be interpreted to give effect to the mutual intention of the parties, insofar as the intent is ascertainable and lawful. The intent to be considered in interpretation is the mutual intent at the time of contracting [Civ. Code § 1636; *see, e.g., Beard v. Goodrich* (2003) 110 Cal. App. 4th 1031, 1037-1039, 2 Cal. Rptr. 3d 160 (substantial evidence supported trial court's ruling that phrase "forgiveness or discharge of debt" in attorney fee agreement contingency fee clause was not ambiguous, and that undetermined and unrecovered claims did not constitute forgiveness or discharge of debt); *De Anza Enterprises v. Johnson* (2002) 104 Cal. App. 4th 1307, 1314-1315, 128 Cal. Rptr. 2d 749 (court determined parties' intent with regard to joint venture buyout procedure by examining nonambiguous contract terms)]. To do this, one looks at the words used in the contract [*Sass v. Hank* (1951) 108 Cal. App. 2d 207, 214, 238 P.2d 652] to find the expressed intent [*Mission Valley East, Inc. v. County of Kern* (1981) 120 Cal. App. 3d 89, 97, 174 Cal. Rptr. 300]. The language of the contract governs its interpretation if the language is clear and explicit and does not involve an absurdity [Civ. Code § 1638; *see, e.g., Crow Winthrop Dev. Ltd.Pshp. v. Jamboree LLC* (In re Crow Winthrop Operating Pshp.) (9th Cir. 2001) 241 F.3d 1121, 1124 (court may interpret contract without recourse to extrinsic evidence if contract terms are unambiguous); *Avemco Insurance Co. v. Davenport* (9th Cir. 1998) 140 F.3d 839, 842; *see also Citizens for Goleta Valley v. HT Santa Barbara* (2004) 117 Cal. App. 4th 1073, 1076-1077, 12 Cal. Rptr. 3d 249 (developer's interpretation of settlement agreement rejected because it defeated reasonable expectations of parties and would have led to absurd results)].

[2] Entire Contract

The entire contract is to be taken as a whole, to give effect to every part, if reasonably practicable, with each clause helping to interpret every other [Civ. Code § 1641]. Even when there are several contracts, they will be taken together if they relate to the same matters, are between the same parties, and were made as parts of substantially one transaction [Civ. Code § 1642].

[3] Ordinary and Technical Words

The words of a contract are to be understood in their ordinary and popular sense [*see, e.g., Foster-Gardner, Inc. v. National Union Fire Insurance Company* (1998) 18 Cal. 4th 857, 878-880, 77 Cal. Rptr. 2d 107, 959 P.2d 265 (word "suit" in insurance policies was not ambiguous; reasonable interpretation was "lawsuit," that is, court proceeding initiated by filing of complaint, and construction that included pre-complaint notices was not reasonable)], rather than according to their strict legal meaning. If, however, the words are used in a technical sense, or if a special meaning is given to them by usage, then the technical or special meaning must be followed [Civ. Code § 1644]. If technical words are used, then those words are to be interpreted as usually understood in the profession or business to which they relate, unless the words are clearly used in a different sense [Civ. Code § 1645].

[4] Circumstances

Although the intention of the parties to a written contract is to be ascertained from the writing alone, if possible [Civ. Code § 1639], a contract may be interpreted by reference to the circumstances under which it was made and the matter to which it relates [Civ. Code § 1647; Code Civ. Proc. § 1860]. For example, when a property settlement agreement provided that the wife must support the "child or children" for as long as she received support payments, a suit against her for support by an adult son raised fact issues about the meaning of "child or children" that required a look at the circumstances of the agreement [*Walsh v. Walsh* (1941) 18 Cal. 2d 439, 442-444, 116 P.2d 62] .

[5] Custom and Usage

Custom and usage may help to interpret a contract or to add provisions by implication [*see, e.g., Wolf v. Superior Court* (2004) 114 Cal. App. 4th 1343, 1346, 1354-1355, 8 Cal. Rptr. 3d 649 (trial court erred in finding term "gross receipts" in author's royalty contract meant only cash and in rejecting extrinsic expert evidence that, in context of entertainment industry, term meant both money and value of other consideration received if not otherwise limited or defined by contract)]. Stipulations that are necessary to make a contract reasonable or conformable to usage will be implied if the contract manifests no contrary intent [Civ. Code § 1655]. Additionally, all that law or usage considers incidental to a contract, or necessary to carry it into effect, will be implied from the contract, unless some of these incidental or necessary things are mentioned in the contract. In that case, others of the same class are excluded [Civ. Code § 1656].

[6] Time for Performance

If no time is specified for the performance of an act required to be performed, a reasonable time is allowed [Civ. Code § 1657; *see, e.g., Resolution Trust Corporation v. First American Bank* (9th Cir. 1998) 155 F.3d 1126, 1128 (statute was not applied to contract that was not silent as to time but instead gave careful consideration to time requirements)].

[7] Inconsistency

When a general provision and a specific provision are inconsistent, the specific provision prevails [Code Civ. Proc. § 1859]. When written or typed provisions are inconsistent with printed provisions, the written or typed provisions control the printed provisions [Civ. Code § 1651]. Words in the contract that are entirely inconsistent with its main purpose are to be rejected [Civ. Code § 1653]. If possible, interpretation should give some effect to the inconsistent clauses, but they are subordinate to the general intent of the whole [Civ. Code §§ 1652, 1650].

[8] Governing Law

A contract is to be interpreted according to the law and usage of the place where it is to be performed. If the contract does not indicate a place of performance, it is to be interpreted according to the law and usage of the place where it is made [Civ. Code § 1646; *see, e.g., Shannon-Vail Five Inc. v. Bunch* (9th Cir. 2001) 270 F.3d 1207, 1210 (finding that

since Nevada was place of performance of loan contract, Nevada law should be applied; analyzing Restatement (Second) of Conflicts to reach same result)]. A contract is "made" where the last act necessary to the contract is performed. Thus when an offer is mailed to an offeree, the contract is made where the offeree receives and accepts the offer [*Navajo County Bank v. Dolson* (1912) 163 Cal. 485, 490, 126 P. 153 ; *Ury v. Jewelers Acceptance Corp.* (1964) 227 Cal. App. 2d 11, 16, 38 Cal. Rptr. 376] .

Notwithstanding Civ. Code § 1646, the parties to an agreement for a transaction having a value of at least \$250,000 (including transactions covered by Com. Code § 1301(a)) may agree that California law will govern the agreement, regardless of whether the agreement bears a reasonable relation to California. This provision does not apply to agreements for labor or personal services, agreements for transactions primarily for personal, family, or household purposes, or any agreement to the extent otherwise provided by Com. Code § 1301(c) [Civ. Code § 1646.5].

[9] Unresolved Uncertainties

Whenever a contract contains uncertain provisions, whether ambiguous or inconsistent, that cannot be resolved under the statutory rules of contract construction, the language of the contract will be construed most strongly against the party who caused the uncertainty to exist [Civ. Code § 1654; see, e.g., *Badie v. Bank of America* (1999) 67 Cal. App. 4th 779, 800-801, 79 Cal. Rptr. 2d 273 (interpreting provision in original credit account agreements that bank could change any "term, condition, service or feature" of account, which was ambiguous as to whether bank could impose alternative dispute resolution clause); *Miller v. United States* (9th Cir. 2004) 363 F.3d 999, 1006 (in case involving Chapter 11 debtor's bankruptcy plan, court of appeals held that lower courts correctly concluded that ambiguous language in plan regarding discharge of "gap period" interest on taxes owed to IRS should be construed against debtor/drafter)]. However, this rule will be applied only when uncertainty cannot be resolved by other rules of contract construction [*Gutzi v. Switzer* (1989) 215 Cal. App. 3d 1636, 1641-1642, 264 Cal. Rptr. 538] . For example, if a typewritten provision absolutely conflicts with a printed provision, the typewritten provision governs [Civ. Code § 1651], and the rule that an ambiguous contract is construed against the drafter is not applicable [*Gutzi v. Switzer* (1989) 215 Cal. App. 3d 1636, 1642-1645, 264 Cal. Rptr. 538] .

[10] Interpretation by Trial Court

Issues of contract interpretation are questions of law for the trial court [*Oceanside 84, Ltd. v. Fidelity Federal Bank* (1997) 56 Cal. App. 4th 1441, 1448, 66 Cal. Rptr. 2d 487] and are not to be decided by a referee under Code Civ. Proc. § 639(a) [*Parsons v. Bristol Development Co.* (1965) 62 Cal. 2d 861, 865, 44 Cal. Rptr. 767, 402 P.2d 839] . Issues of contract enforceability, such as whether an agreement is a contract of adhesion and, if so, whether it is enforceable, are equitable issues to be resolved by the trial court rather than a referee [*De Guere v. Universal City Studios, Inc.* (1997) 56 Cal. App. 4th 482, 501, 65 Cal. Rptr. 2d 438 ; see *Westlye v. Look Sports, Inc.* (1993) 17 Cal. App. 4th 1715, 1735-1737, 22 Cal. Rptr. 2d 781] . The interpretation of a written instrument, even though it involves what might be called questions of fact, is a judicial function to be exercised according to the generally accepted canons of interpretation so that the purposes of the instrument may be given effect. It is solely a judicial function, therefore, to interpret a written instrument unless the interpretation turns on the credibility of extrinsic evidence [*Oceanside 84, Ltd. v. Fidelity Federal Bank* (1997) 56 Cal. App. 4th 1441, 1451, 66 Cal. Rptr. 2d 487 (issue involved matter of law, and appellant was not entitled to jury trial); see *Crow Winthrop Dev. Ltd. Pshp. v. Jamboree LLC (In re Crow Winthrop Operating Pshp.)* (9th Cir. 2001) 241 F.3d 1121, 1124 (bankruptcy court properly determined validity of change in ownership provision; court may interpret contract without recourse to extrinsic evidence if contract terms are unambiguous); *Sanchez v. Bally's Total Fitness Corp.* (1998) 68 Cal. App. 4th 62, 69, 79 Cal. Rptr. 2d 902 (construction of health club release and assumption of risk provision was matter of law; because contract provision was clear, explicit, and comprehensible in itself, court found plaintiff's cause of action for negligence barred by terms of agreement)].

Legal Topics:

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

Contracts LawContract InterpretationGeneral OverviewContracts LawFormationGeneral Overview



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DIVISION V: CONTRACTS AND OBLIGATIONS
CHAPTER 75 FORMATION OF CONTRACTS AND STANDARD CONTRACTUAL PROVISIONS
PART II. LEGAL BACKGROUND

27-75 California Legal Forms--Transaction Guide § 75.16

§ 75.16 Parol Evidence Rule

[1] Effect of Written Agreement

The execution (signing) of a contract in writing, whether the law requires a writing or not, supersedes all the negotiations or stipulations about the subject which preceded or accompanied the execution of the contract [*Civ. Code § 1625*]. When a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone, if possible [*Civ. Code § 1639*]. Terms in a writing that is intended by the parties as a final expression of their agreement with respect to these terms may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement [*Code Civ. Proc. § 1856(a)*; see, e.g., *Bionghi v. Metro Water Dist. of Southern California* (1999) 70 Cal. App. 4th 1358, 1369, 83 Cal. Rptr. 2d 388 (contract that was integrated, and in unambiguous terms required only notice for termination, was not on its face reasonably susceptible of good cause requirement)]. This rule is known as the parol evidence rule [*Masterson v. Sine* (1968) 68 Cal. 2d 222, 225-227, 65 Cal. Rptr. 545, 436 P.2d 561 ; *BMW of North America, Inc. v. New Motor Vehicle Bd.* (1984) 162 Cal. App. 3d 980, 990, 209 Cal. Rptr. 50] . Although the rule results in the exclusion of evidence, it is not a rule of evidence but rather is a rule of substantive law. For example, the California Supreme Court has held that the termination of a breach of contract and fraud action based on the parol evidence rule satisfied the favorable termination element of a malicious prosecution claim [*Casa Herrera, Inc. v. Beydoun* (2004) 32 Cal. 4th 336, 343, 349, 9 Cal. Rptr. 3d 97, 83 P. 3d 497] .

Sales of goods under the Commercial Code are governed by a special parol evidence rule [see *Com. Code § 2202*]. For a discussion of sales of goods and the parol evidence rule, see Ch. 52, *Sale of Goods Under the Uniform Commercial Code* .

[2] Integration of Agreement

The parol evidence rule bars the introduction of extrinsic evidence to vary the terms of a written agreement only if the agreement is an integrated agreement. An integrated agreement is a complete and final embodiment of the terms of an agreement [*Masterson v. Sine* (1968) 68 Cal. 2d 222, 225, 65 Cal. Rptr. 545, 436 P.2d 561 ; *Bionghi v. Metro Water Dist. of Southern California* (1999) 70 Cal. App. 4th 1358, 1369, 83 Cal. Rptr. 2d 388 (contract was integrated and in unambiguous terms required only notice for termination; parol evidence was inadmissible to prove contract terms); *BMW of North America, Inc. v. New Motor Vehicle Bd.* (1984) 162 Cal. App. 3d 980, 990 n.4, 209 Cal. Rptr. 50] .

Partial integration may exist when only part of the agreement concerning a transaction is reduced to writing [*Schwartz v. Shapiro* (1964) 229 Cal. App. 2d 238, 249-251, 40 Cal. Rptr. 189 ; see *Founding Members of Newport Beach Country Club v. Newport Beach Country Club, Inc.* (2003) 109 Cal. App. 4th 944, 953-954, 135 Cal Rptr. 2d 505 (part of contract regarding right of first offer of sale was integrated)]. In a case of partial integration, parol evidence is admissible to prove the oral portion of the agreement but may not be offered to vary or contradict the written elements of the agreement [*Hulse v. Juillard Fancy Foods Co.* (1964) 61 Cal. 2d 571, 573, 39 Cal. Rptr. 529, 394 P.2d 65 ; *Schwartz v. Shapiro* (1964) 229 Cal. App. 2d 238, 250-253, 40 Cal. Rptr. 189] . The terms of a written contract may be explained or supplemented by evidence of consistent additional terms unless the writing is intended as a complete and exclusive statement of the terms of the agreement [Code Civ. Proc. § 1856(b)]. Whether the writing is intended by the parties as a final expression of their agreement with respect to the included terms and whether the writing is intended also as a complete and exclusive statement of the terms of the agreement are to be determined by the court [Code Civ. Proc. § 1856(d)].

[3] Exceptions to Rule

Even when the agreement is intended to be both final and complete, certain types of evidence may be admissible despite the parol evidence rule. Admissible items include the following:

- Course of dealing or usage of trade or course of performance offered to explain or supplement the terms of the writing [Code Civ. Proc. § 1856(c)].
- Evidence about a mistake or imperfection of the writing, if the mistake or imperfection is put in issue by the pleadings [Code Civ. Proc. § 1856(e); see *Pacific State Bank v. Greene* (2003) 110 Cal. App. 4th 375, 388-389, 1 Cal. Rptr. 3d 739 (loan guarantor's declaration regarding which loan she intended to guarantee raised triable issue of fact concerning mutual mistake defense in bank's action to recover on several loans)].
- Evidence about the validity of the agreement, if validity is the fact in dispute [Code Civ. Proc. § 1856(f)].
- Evidence of the circumstances under which the agreement was made or to which it relates [Code Civ. Proc. § 1856(g); see, e.g., *Denver D. Darling, Inc. v. Controlled Environments Construction, Inc.* (2001) 89 Cal. App. 4th 1221, 1234-1235 (parol evidence rule did not bar extrinsic evidence introduced to assist court in ascertaining parties' intent regarding ambiguity of floor flatness standard in structural concrete subcontract); *Neverkovec v. Fredericks* (1999) 74 Cal. App. 4th 337, 350-353, 87 Cal. Rptr. 2d 856 (parol evidence rule did not bar extrinsic evidence introduced by third party regarding intent of parties to release)].
- Evidence to explain an intrinsic ambiguity or otherwise interpret the terms of the agreement [Code Civ. Proc. § 1856(g); see *Parsons v. Bristol Development Co.* (1965) 62 Cal. 2d 861, 865, 44 Cal. Rptr. 767, 402 P.2d 839 (extrinsic evidence is admissible to interpret, but not to give contract meaning that is not reasonably consistent with language of contract); *Nofziger v. Holman* (1964) 61 Cal. 2d 526, 528, 39 Cal. Rptr. 384, 393 P.2d 696 (extrinsic evidence is admissible to interpret ambiguous language, but not to modify or vary); *Kavruv v. Blue Cross of California* (2003) 108 Cal. App. 4th 773, 782-784, 134 Cal. Rptr. 2d 152 (insured entitled to submit parol evidence to support interpretation of ambiguous health insurance policy term)].
- Evidence to establish illegality or fraud [Code Civ. Proc. § 1856(g); see *Pacific State Bank v. Greene* (2003) 110 Cal. App. 4th 375, 389-389, 1 Cal. Rptr. 3d 739 (loan guarantor's declaration

regarding which loan she intended to guarantee raised triable issue of fact as to fraud in the inducement or execution of guaranty agreements); *see also* *Wang v. Massey Chevrolet* (2002) 97 Cal. App. 4th 856, 873-876, 118 Cal. Rptr. 2d 770 (fraud exception to parol evidence rule does not apply to promissory fraud when evidence in question is offered to show promise that contradicts integrated written agreement)].

Legal Topics:

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

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27-75 California Legal Forms--Transaction Guide § 75.17

§ 75.17 Electronic Contracts and Signatures

[1] In General

With the advent of the Internet and other advances in technology, agreements are frequently negotiated and finalized by electronic communication methods such as fax, e-mail, or Internet websites. Agreements formed in this manner are not "written" or "signed" within the traditional meanings of those terms. In recognition of the changes in the way agreements are formed and preserved, both California and the federal government have enacted legislation validating electronic documents and electronic signatures. In California, the governing statute is the Uniform Electronic Transactions Act (UETA) [*Civ. Code § 1633.1 et seq.*]. Nearly all other states also have enacted UETA. The federal counterpart is the Electronic Signatures in Global and National Commerce Act (E-SIGN) [Pub. L. No. 106-229, tit. 1, 2 (June 30, 2000); *15 U.S.C. § 7001 et seq.*]. For a discussion of the relationship between the state and federal statutes, see § 75.17[3][b].

[2] California Transactions

[a] Application of Uniform Act

In California, UETA applies (with some specified exceptions) to electronic records and electronic signatures relating to a "transaction"; that is, an action or set of actions occurring between two or more persons relating to the conduct of business, commercial, or governmental affairs [*Civ. Code § 1633.3(a)*; see *Civ. Code § 1633.2(o)* (definition of "transaction"); see also *Civ. Code §§ 1633.2(an), 1633.3(bd), (f)* (other definitions; exceptions)]. UETA is to be construed and applied so as to facilitate electronic transactions consistent with other applicable law; to be consistent with reasonable practices concerning electronic transactions and with the continued expansion of those practices; and to effectuate the general purpose to make uniform the law with respect to the subject of UETA among states enacting it [*Civ. Code § 1633.6*].

Numerous specific statutory exclusions from UETA exist [see *Civ. Code § 1633.3(b), (c)*]. The broadest exclusions include the following:

- Transactions subject to a law governing the creation and execution of wills, codicils, or testamentary

trusts [Civ. Code § 1633.3(b)(1)].

- Transactions subject to Division 1 of the Commercial Code, except *Com. Code* §§ 1107 and 1206 [Civ. Code § 1633.3(b)(2)].

- Transactions subject to Divisions 3 (negotiable instruments), 4 (bank deposits and collections), 5 (letters of credit), 8 (investment securities), 9 (secured transactions), or 11 (funds transfers) of the Commercial Code [Civ. Code § 1633.3(b)(3)].

- Transactions subject to any law requiring that specifically identifiable text or disclosures in a record or portion of a record be separately signed or initialed [Civ. Code § 1633.3(b)(4)]. This would include various consumer protection laws, although some of these laws, such as the federal Truth In Lending Act, contain their own provision governing electronic disclosures [see 12 C.F.R. § 12 C.F.R. § 226.31(b) (electronic delivery of Regulation Z disclosures); see also *Ch. 45, Consumer Installment Loans and Credit Sales*, § 45.220[1][c]]. However, this exclusion does *not* apply to transactions subject to Civ. Code §§ 1677 or 1678, relating to liquidated damages in real property sales contracts, or *Code Civ. Proc.* § 1278, relating to arbitration provisions in real property sales contracts.

Although transactions excluded from UETA are not subject to its provisions, they still may be conducted by electronic means if that can be done under any other applicable law [Civ. Code § 1633.3(f)].

[b] Effect of Electronic Contract or Signature

Under UETA, a record or signature may not be denied legal effect or enforceability solely because it is in electronic form. A contract may not be denied legal effect or enforceability solely because an electronic record was used in its formation. If a law requires a record to be in writing, an electronic record satisfies the law. If a law requires a signature, an electronic signature satisfies the law [Civ. Code § 1633.7; see Civ. Code § 1633.2(a), (d), (e), (g), (h), (m) (definitions of "contract," "electronic," and "record")]. In a case evaluating, under common law, the validity of an e-mail sent prior to enactment of the UETA, a federal court held that the e-mail, signed with a party's name, satisfied the statute of frauds, assuming that a binding oral agreement existed and that the e-mail included all of the material terms of that agreement [*Lamle v. Mattel, Inc.* (Fed. Cir. 2005) 394 F.3d 1355, 1362-1363] .

Evidence of a record or signature may not be excluded in a proceeding solely because it is in electronic form [Civ. Code § 1633.13].

[c] Effect of Uniform Act on Parties

UETA does not *require* that a record or signature be created, generated, sent, communicated, received, stored, or otherwise processed or used, by electronic means or in electronic form [Civ. Code § 1633.5(a)].

Moreover, UETA applies only to a transaction between parties each of whom has agreed to conduct the transaction by electronic means. Whether the parties agree to conduct a transaction by electronic means is determined from the context and surrounding circumstances, including the parties' conduct. Except for a separate and optional agreement the primary purpose of which is to authorize a transaction to be conducted by electronic means, an agreement to conduct a transaction by electronic means may not be contained in a standard form contract that is not an electronic record. An agreement in such a standard form contract may not be conditioned on an agreement to conduct transactions by electronic means. An agreement to conduct a transaction by electronic means may not be inferred solely from the fact that a party has used electronic means to pay an account or register a purchase or warranty. These statutory rules may not be varied by agreement [Civ. Code § 1633.5(b)].

A party that agrees to conduct a transaction by electronic means may refuse to conduct other transactions by electronic means. If a seller sells goods or services by both electronic and nonelectronic means and a buyer purchases the goods or services by conducting the transaction by electronic means, the buyer may refuse to conduct further transactions regarding the goods or services by electronic means. These statutory rules may not be varied by agreement [*Civ. Code* § 1633.5(c)].

Except as otherwise provided in UETA, the effect of any of its provisions may be varied by agreement. The presence in certain provisions of UETA of the words "unless otherwise agreed," or words of similar import, does not imply that the effect of other provisions may not be varied by agreement [*Civ. Code* § 1633.5(d)].

[d] Attribution of Electronic Contract or Signature to Party

An electronic record or electronic signature is attributable to a person if it was the act of the person. The act of the person may be shown in any manner, including a showing of the efficacy of any security procedure applied to determine the person to whom the electronic record or electronic signature was attributable [*Civ. Code* § 1633.9(a)]. The effect of an electronic record or electronic signature attributed to a person under the foregoing rules is determined from the context and surrounding circumstances at the time of its creation, execution, or adoption, including the parties' agreement, if any, and otherwise as provided by law [*Civ. Code* § 1633.9(b)].

[e] Other Effects of Uniform Act

UETA also provides rules affecting the following aspects of transactions subject to it:

- Providing, sending, or delivering information "in writing" to another person, and the posting, displaying, or formatting of such information [*see Civ. Code* § 1633.8].
- Making changes, and dealing with errors, in electronic records [*see Civ. Code* § 1633.10].
- Notarizing an electronic signature, and signing under penalty of perjury [*see Civ. Code* § 1633.11].
- Complying with legal requirements to retain specified types of records [*see Civ. Code* § 1633.12].
- Conducting wholly automated transactions [*see Civ. Code* § 1633.14].
- Sending and receiving electronic records related to a transaction [*see Civ. Code* § 1633.15].
- Using electronic means to send a notice of a right to cancel [*see Civ. Code* § 1633.16].
- Prohibiting state agents from interfering with the use of electronic signatures [*see Civ. Code* § 1633.17].

[3] Interstate and International Transactions

[a] Effect of Electronic Contract or Signature

The federal E-SIGN law applies to any transaction in or affecting interstate or foreign commerce [*see 15 U.S.C. § 7001(a)*]. Under E-SIGN, notwithstanding any statute, regulation, or other rule of law, a signature, contract, or other record relating to a transaction affecting interstate or foreign commerce may not be denied legal effect, validity, or enforceability solely because it is in electronic form, and a contract relating to such a transaction may not be denied legal effect, validity, or enforceability solely because an electronic signature or electronic record was used in its formation [*15 U.S.C. § 7001(a)*; *see 15 U.S.C. § 7006* (definitions)]. The term "transaction" means an action, or a set of

actions, relating to the conduct of business, consumer, or commercial affairs between two or more persons, including any of the following types of conduct [15 U.S.C. § 7006(13)]:

- The sale, lease, exchange, licensing, or other disposition of personal property (including goods and intangibles) or services (or any combination of these actions).
- The sale, lease, exchange, or other disposition (or any combination of these actions) of any interest in real property.

The E-SIGN requirements do not limit, alter, or otherwise affect any requirement imposed by a statute, regulation, or rule of law, other than a requirement that contracts or other records be written, signed, or in nonelectronic form [15 U.S.C. § 7001(b)(1)].

However, E-SIGN does not require anyone to agree to use or accept electronic records or electronic signatures (except a governmental agency, with respect to a record other than a contract to which it is a party) [15 U.S.C. § 7001(b)(2)].

[b] Effects of State Laws

State law, regulation, or other rule of law may modify, limit, or supersede the provisions of 15 U.S.C. § 7001 [discussed in [a], *above*] with respect to state law in the following cases [15 U.S.C. § 7002(a)]:

- The law or regulation in question constitutes an enactment of UETA *as approved and recommended for enactment in all the states by the National Conference of Commissioners on Uniform State Laws in 1999*, except that any exception to the scope of UETA enacted by a state [see, e.g., *Civ. Code* § 1633.3(b)(4), (c) (California exceptions)] is preempted to the extent that the exception is inconsistent with the regulatory provisions of E-SIGN. In other words, UETA controls in states that have enacted it, but individual state modifications of UETA that are inconsistent with E-SIGN are preempted.
- The law or regulation in question specifies alternative procedures or requirements for the use and/or acceptance of electronic records or signatures to establish the legal effect, validity, or enforceability of contracts, if these procedures or requirements are consistent with E-SIGN.

UETA has been enacted in all but four states, and those four have equivalent laws [see 15 U.S.C. § 7002(a)(2)]. UETA has also been enacted in the District of Columbia and the U.S. Virgin Islands.

In addition, state law may not require or accord greater legal status or effect to the implementation or application of a specific technology or technical specification for performing the functions of creating, storing, generating, receiving, communicating, or authenticating electronic records or electronic signatures [15 U.S.C. § 7002(a)(2)(A)(ii); see 15 U.S.C. § 7002(a)(1)]. States also are not permitted to circumvent the regulatory provisions of E-SIGN through the imposition of nonelectronic delivery methods under section 8(b)(2) of UETA [15 U.S.C. § 7002(c); see *Civ. Code* § 1633.8(b)(2)].

In a few other specified circumstances state law will supersede E-SIGN requirements [see 15 U.S.C. § 7003]. Specifically, the requirement to give effect to an electronic contract or signature does not apply to a contract or other record to the extent it is governed by any of the following state laws [15 U.S.C. § 7003(a)]:

- A statute, regulation, or other rule of law governing the creation and execution of wills, codicils, or testamentary trusts.
- A statute, regulation, or other rule of law governing adoption, divorce, or other matters of family

law.

- The Uniform Commercial Code, other than section 1-206 (presumptions), Article 2 (sales of goods), and Article 2A (personal property leases) [*see Com. Code §§ 1206, 2101 et seq., 10101 et seq.*].

The requirement to give effect to an electronic signature or record also does not apply to court documents (such as orders, notices, briefs and pleadings); notices of cancellation or termination of utility services; specified notices in connection with default, acceleration, repossession, foreclosure, eviction, or right to cure under a credit agreement secured by, or a rental agreement for, an individual's primary residence; cancellation of health or life insurance benefits; product recall notices [*15 U.S.C. § 7003(b)(2)*]; and any document required to accompany any transportation or handling of toxic or dangerous materials [*15 U.S.C. § 7003(b)(3)*].

Legal Topics:

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

Contracts LawContract Conditions & ProvisionsGeneral OverviewContracts LawContract InterpretationGeneral OverviewContracts LawFormationGeneral Overview



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[Reserved]

§§ 75.18[Reserved]



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PART III. TRANSACTION GUIDE
A. Client Interview--Facts and Documents

27-75 California Legal Forms--Transaction Guide § 75.100

§ 75.100 Facts

1. Names, addresses, and telephone numbers of all contracting parties.
2. Status of parties.
 - a. Individual.
 - b. Sole proprietor.
 - c. Limited partnership.
 - d. General partnership.
 - e. Unincorporated association.
 - f. Corporation.
 - (1) Corporation for profit.
 - (2) Nonprofit corporation.
 - (3) Corporation sole.
 - (4) Charitable corporation.
 - (5) Consumer cooperative corporation.

(6) Professional corporation.

(7) Foreign corporation.

(a) Authority to do business in California.

(b) Agent for service of process.

NOTE:

Foreign corporations doing business in California are required to file with the Secretary of State the name of an agent for service of process in California [*Corp. Code* § 2105(a)(4)].

g. Limited liability company

h. Government entity or agency.

i. Executor.

j. Administrator.

k. Guardian.

l. Conservator.

m. Trustee.

n. Agent.

o. Attorney-in-fact.

p. Employee.

q. Other.

3. Capacity.

a. Whether any party is minor.

b. Whether any party has been adjudicated incompetent.

4. Authority of parties.

a. Corporation or government entity.

(1) Whether corporation has passed resolution authorizing contract.

(2) Whether officer has authority to sign for corporation or agency.

b. Agent, employee, or attorney-in-fact.

5. Type of document to be drafted.

- a. Offer.
- b. Revocation of offer.
- c. Option.
- d. Acceptance.
- e. Rejection.
- f. Counteroffer.
- g. Agreement.

6. Style of document.

- a. Formal.
- c. Letter agreement.

7. Previous negotiations between the parties.

8. Local customs.

9. Trade usages or practices.

10. Technical terms.

11. Outstanding contractual obligations.

12. Proposed terms of agreement.

13. Consideration for agreement.

14. Primary purpose of agreement.

15. Personality and objectives of other parties.

16. When contract is needed.

17. Duration of contract.

18. Whether contract will encumber Indian lands for seven or more years.

NOTE:

The term "Indian lands" means lands the title to which is held by the United States in trust for an Indian tribe or lands the title to which is held by an Indian tribe subject to a restriction by the

United States against alienation [25 U.S.C. § 81(a)(1)]. No agreement or contract with an Indian tribe that encumbers Indian lands for a period of seven or more years will be valid unless that agreement or contract bears the approval of the Secretary of the Interior or a designee of the Secretary [25 U.S.C. § 81(b)]. This statute requires approval by the Secretary of contracts that implicate lands already held in trust by the United States for an Indian tribe. The statute does not require approval if the contract implicates only lands that are merely anticipated to become, at some future date, lands held in trust for an Indian tribe [Guidiville Band of Pomo Indians v. NGV Gaming, Ltd. (9th Cir. 2008) 531 F.3d 767, 2008 U.S. App. LEXIS 13474, at *43] .

Legal Topics:

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

Contracts LawContract InterpretationGeneral OverviewContracts LawFormationGeneral Overview



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PART III. TRANSACTION GUIDE
A. Client Interview--Facts and Documents

27-75 California Legal Forms--Transaction Guide § 75.101

§ 75.101 Documents to Be Obtained

1. Communications between parties that bear on present transaction or reflect prior courses of dealing.
 - a. Letters.
 - b. Memoranda.
 - c. Contracts.
 - d. Telegrams.
2. Business records that may be relevant to current transaction.
 - a. Minute books.
 - b. Account books.
 - c. Sales records.
 - d. Production records.
 - e. Ledgers.
3. Papers, pamphlets, or other documents indicative of customs and usages of particular trade or business.

4. Any other pertinent documents from which useful or necessary information may be obtained.

- a. Contracts.
- b. Deeds.
- c. Leases.
- d. Insurance policies.
- e. Partnership agreements.
- f. Corporate documents.
 - (1) Articles of incorporation.
 - (2) Bylaws.
 - (3) Minutes.
 - (4) Records.

Legal Topics:

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

Contracts LawContract Conditions & ProvisionsGeneral OverviewContracts LawContract InterpretationGeneral Overview



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27-75 California Legal Forms--Transaction Guide §§ 75.102-75.109

[Reserved]

§§ 75.102[Reserved]



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27-75 California Legal Forms--Transaction Guide § 75.110

§ 75.110 Parties

1. Determine identities of parties.
2. Make sure there are at least two parties.
3. Determine that parties have capacity to contract.

- a. If party may be under 18, verify age.

NOTE:

A minor who falsely claims to be 18 may still be able to avoid the contract [*Williams v. Leon T. Shettler Co. (1929) 98 Cal. App. 282, 283, 276 P. 1065*] . For general discussion of the powers of minors to contract, and the disaffirmance of contracts made by minors, see Ch. 100B, ***Contracts and Employment of Minors*** .

- b. If party is under 18, determine whether special facts enable party to contract.

- (1) Party is or was married.
 - (2) Party is in armed forces.
 - (3) Party has been declared emancipated.
 - (4) Parent, guardian, or other adult third party could sign for minor.

- c. Determine whether any party is of unsound mind.

4. Determine whether parties have authority to contract.

Legal Topics:

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

Contracts LawContract Conditions & ProvisionsGeneral OverviewContracts LawContract InterpretationGeneral
OverviewContracts LawFormationGeneral OverviewContracts LawFormationCapacity of PartiesGeneral Overview



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27-75 California Legal Forms--Transaction Guide § 75.111

§ 75.111 Object of Contract

1. Determine object of contract.
2. Determine whether object is legal [*see* § 75.11[3][a]].

Legal Topics:

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

Contracts LawContract InterpretationGeneral OverviewContracts LawFormationGeneral Overview



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27-75 California Legal Forms--Transaction Guide § 75.112

§ 75.112 Offers and Options

1. Determine whether offer is to be made to specific person or persons or to general public.
2. Determine whether offeror intends to create unilateral or bilateral contract [*see* § 75.12[2]].
 - a. Unilateral contract may be accepted only by performance.
 - b. Bilateral contract may be accepted by promise to perform.
3. Determine whether terms of offer are sufficiently definite and complete to make valid offer.
 - a. Eliminate ambiguities.
 - b. Leave no major terms for future agreement.
4. Determine manner and time limit for acceptance.
5. Decide whether acceptance should be made effective only on receipt.

NOTE:

Acceptance normally is deemed to be fully communicated when the accepting party puts the acceptance in the course of transmission to the proposer [*Civ. Code* § 1583]. This requires that the accepting party place the acceptance beyond his or her control. Therefore, a written acceptance given to an office mail clerk does not become effective until deposited in the mail at the post office [*Gibbs v. American Savings & Loan Assn.* (1990) 217 Cal. App. 3d 1372, 1376, 266 Cal. Rptr. 517] .

6. Determine whether offeror intends that offer be held open, in which case option is appropriate [*see* § 75.215].

- a. Decide how long option is to remain open.
 - b. Decide whether particular means of acceptance will be required.
 - c. Determine that there is consideration to support option.
7. If client wishes to revoke offer, determine whether revocation is possible.
- a. Determine whether there is valid option in effect that bars revocation.
 - b. Determine whether effective acceptance has been made.
 - c. Determine whether method or form of revocation is limited by agreement.

Legal Topics:

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

Contracts LawContract InterpretationGeneral OverviewContracts LawFormationOffersGeneral OverviewContracts LawTypes of ContractsOption Contracts



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27-75 California Legal Forms--Transaction Guide § 75.113

§ 75.113 Acceptance or Rejection

1. Determine whether valid offer has been made [*see* § 75.210].
2. If effective offer has been made, determine who has power of acceptance.
3. Determine whether offer has been terminated.
 - a. Expiration through lapse of time.
 - b. Revocation by offeror.
 - c. Prior rejection by offeree.
 - d. Death of offeror or offeree.
 - e. Insanity of offeror or offeree.
4. Determine whether mode of acceptance complies with requirements of offer [*see* § 75.214].
5. If offeree wishes to reject offer [*see* § 75.212]:
 - a. Determine whether right of rejection has been lost through prior acceptance.
 - b. Determine appropriate mode of rejection.
 - (1) Use outright rejection to reject offer, terminate power of acceptance, and end negotiations.

(2) Use conditional rejection to reject offer and terminate power of acceptance, but keep negotiations open.

(3) Use conditional acceptance, with reservation of power to accept original offer, to reject offer but preserve power of acceptance and keep negotiations open [see § 75.214[1][d], [3]].

Legal Topics:

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

Contracts LawFormationGeneral OverviewContracts LawFormationOffersGeneral Overview



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27-75 California Legal Forms--Transaction Guide § 75.114

§ 75.114 Consideration

1. Determine whether promises made or to be made in contract are supported by consideration.
2. Determine whether consideration is sufficient to create contract [*see § 75.11[4][f]*].

Legal Topics:

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

Contracts LawConsiderationGeneral OverviewContracts LawFormationGeneral Overview



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27-75 California Legal Forms--Transaction Guide § 75.115

§ 75.115 Use of Written Contract

1. Determine whether contract is one of following types of contracts and therefore must be in writing to satisfy requirements of statute of frauds [*see Civ. Code § 1624*]:

- a. Contract that, by its own terms, is not to be performed within one year of its making [*see Civ. Code § 1624(a)(1)*].
- b. Special promise to answer for debt, default, or miscarriage of another [*see Civ. Code § 1624(a)(2)*; *see also Civ. Code § 2794* (suretyship obligations that need not be in writing)].
- c. Real property lease for period of more than one year or agreement for sale of interest in real property [*see Civ. Code §§ 1091, 1624(a)(3)*; *Code Civ. Proc. § 1971*].
- d. Contract giving agent power to enter into real property lease for period of more than one year or agreement for sale of interest in real property [*see Civ. Code § 1624(a)(3)*].
- e. Contract authorizing or employing agent, broker, or other person to buy or sell real estate, or to lease real estate for period of more than one year, for compensation or commission [*see Civ. Code § 1624(a)(4)*].
- f. Contract authorizing or employing agent, broker, or other person to procure, introduce, or find buyer or seller of real estate or lessee or lessor of real estate when lease is for period of more than one year, for compensation or commission [*see Civ. Code § 1624(d)*].
- g. Contract that, by its terms, is not to be performed during lifetime of promisor [*see Civ.*

Code § 1624(e)].

h. Agreement by buyer of real estate to pay debt secured by mortgage or deed of trust on property purchased [*see Civ. Code § 1624(f)*].

NOTE:

A contract of this type does not have to be in writing if assumption of the debt by the buyer is specifically provided for in the conveyance of the property [*Civ. Code § 1624(f)*].

i. Contract, promise, undertaking, or commitment to lend money or to grant or extend credit, in amount greater than \$100,000, made by person engaged in business of lending or arranging for lending of money or extending credit [*see Civ. Code § 1624(g)*].

NOTE:

This requirement for a writing does not apply to transactions that are primarily for personal, family, or household purposes. Contracts, promises, undertakings, or commitments to lend money that are secured solely by residential property consisting of one to four dwelling units are considered to be made for personal, family, or household purposes [*Civ. Code § 1624(g)*].

j. Contract for the sale of personal property over \$5,000, with following exceptions [*see Civ. Code § 1624.5(a)*; § 75.14[1]]:

(1) Contracts governed by Commercial Code [*Civ. Code § 1624.5(b)*; *see Com. Code § 2201* (contracts for sale of goods); *Com. Code § 8113* (contracts for sale of securities), *Com. Code §§ 9201, 9202* (security agreements)].

(2) Specified "qualified financial contracts" [*see Civ. Code § 1624.5(c)*].

2. Determine whether contract is required to be in writing by statute other than statute of frauds.

a. Contract for sale of goods with price of \$500 or more [*see Com. Code § 2201*].

b. Contract granting nonpossessory security interest [*see Com. Code § 9203*].

c. Contract to arbitrate [*see Code Civ. Proc. § 1281*].

d. Contract to create joint tenancy [*see Civ. Code § 683*].

e. Contract to transfer interest in ship [*see Civ. Code § 1135*].

f. Contract to accept part performance of obligation with no new consideration [*see Civ. Code § 1524*].

g. Release extinguishing obligation without consideration [*see Civ. Code § 1541*].

h. Unexecuted agreement to modify written contract [*see Civ. Code § 1698*; *Com. Code § 2209(2)*].

NOTE:

A contract of this type does not have to be in writing if supported by new consideration [*Civ. Code § 1698*].

- i. Contract giving authority to enter into contract required by law to be in writing [*see Civ. Code* § 2309].
 - j. Mortgage [*see Civ. Code* § 2922].
 - k. Power of attorney to execute mortgage [*see Civ. Code* § 2933].
 - l. Acknowledgment or promise that evidences new or continuing contract, reviving obligation barred by statute of limitations [*see Code Civ. Proc.* § 360].
 - m. Contract for sale of securities [*see Com. Code* § 8113].
 - n. Contract by executor or administrator to personally answer for debt of decedent [*see Prob. Code* § 9604].
 - o. Consumer lease [*see Com. Code* § 10103(a)(5)] or lease under which payments, exclusive of payments for options to renew or buy, are \$1,000 or more [*see Com. Code* § 10201(a)(1)].
3. Determine kind of contract best suited to needs of parties.
- a. Formal written contract [*see* § 75.200].
 - b. Letter agreement [*see* § 75.201].
 - c. Other kind of contract.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts Law Formation General Overview



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27-75 California Legal Forms--Transaction Guide § 75.116

§ 75.116 Standard Contractual Provisions

1. Determine whether any obligation is conditional obligation.
 - a. Ascertain type of condition.
 - (1) Condition precedent [*see Civ. Code § 1436; §§ 75.230, 75.231*].
 - (2) Concurrent conditions [*see Civ. Code § 1437; § 75.232*].
 - (3) Condition subsequent [*see Civ. Code § 1438; § 75.233*].
 - b. Determine whether existence of conditional obligation depends on satisfaction of obligor or of third party [*see § 75.231*].
 - (1) Satisfaction as matter of fancy, taste, or judgment.
 - (2) Satisfaction as matter of commercial value or quality, operative fitness, or mechanical utility.
 - (3) Subjective or objective test of satisfaction.
 - c. Determine whether to include exculpatory clause relieving client from liability for negligence [*see § 75.234*].
 - d. Determine whether parties intend to be excused from performance in event of act of God or unpreventable act of human agency [*see § 75.235*].

e. Determine whether termination of contract should be permitted [see § 75.240 et seq.].

(1) Grounds or conditions giving rise to right terminate.

(2) Unilateral or mutual right to terminate.

(3) Kind of notice required for termination.

2. Determine how contract should address questions relating to enforcement and remedies.

a. Arbitration.

NOTE:

An arbitration provision could implicate the Federal Arbitration Act [9 U.S.C. § 1 et seq.] along with numerous decisions, by both the U.S. Supreme Court and the Ninth Circuit Court of Appeals, determining the intent and effects of that law. As a result, the arbitration provision could be enforceable without regard to whether, or to what extent, the contract containing it is enforceable [*Prima Paint v. Flood & Conklin* (1967) 388 U.S. 395, 404, 87 S. Ct. 1801, 18 L. Ed. 2d 1270] , and even if the contract is void [*Buckeye Check Cashing, Inc. v. Cardegna* (2006) 546 U.S. 440, 446-447, 126 S. Ct. 1204, 163 L. Ed. 2d 1038 ; *Bruni v. Didion* (2008) 160 Cal. App. 4th 1272, 1283-1284, 73 Cal. Rptr. 3d 395] . The same result could follow from the application of California law, in the event that the federal law did not govern [see *Ericksen, Arbuthnot, McCarthy, Kearney & Walsh, Inc. v. 100 Oak Street* (1983) 35 Cal. 3d 312, 322-324, 197 Cal. Rptr. 581, 673 P.2d 251 ; *Bruni v. Didion* (2008) 160 Cal. App. 4th 1272, 1285, 73 Cal. Rptr. 3d 395] . Whether and how to provide for arbitration in the contract should be determined in the light of a careful review of the applicable state and federal statutes and court decisions concerning the scope, effect, and enforcement of agreements to arbitrate. For further discussion, see California Forms of Pleading and Practice, Ch. 32, *Contractual Arbitration: Agreements and Compelling Arbitration* , and Ch. 34, *Contractual Arbitration: Judicial Review* (Matthew Bender).

(1) Given relations of parties and degree of likelihood of disputes, determine whether arbitration would be desirable to resolve disputes [see § 75.250].

(2) Decide whether certain kinds of disputes should be excepted from arbitration.

(3) Decide what rules of arbitration should govern.

b. Liquidated damages [see Civ. Code § 1671; § 75.251].

(1) Determine what possible losses might result from breach of agreement.

(2) Decide whether ascertaining actual damages from breach would be impractical or very difficult.

(3) Determine whether stipulated sum of money would be more satisfactory to client than some other form of relief.

(4) Determine whether it would be desirable to use liquidated damages provision to establish and

thereby limit client's own liability.

(5) Determine whether liquidated damages provision would be enforceable.

3. Determine how contract should address questions relating to joint and several rights and obligations [*see* § 75.260 et seq.].

4. Determine how contract should address questions relating to interpretation of agreement.

a. Integration ("entire agreement") clause [*see* § 75.270].

(1) Review negotiations of parties and determine:

(a) What form negotiations have taken, whether oral, written, or both.

(b) What subjects have been covered.

(2) Determine whether contract is intended as final expression of parties' agreement on subject.

b. Contract in severable parts [*see* § 75.271].

(1) Contract involves several sets of performances, part of each set being agreed exchange for corresponding part of set of performances to be rendered by promisor.

(2) Contract is to be performed in installments.

(3) Part of contract might be found illegal or unenforceable.

c. Effect of captions or headings [*see* § 75.272].

(1) Determine whether contract is sufficiently long and complex that captions or headings would be useful to make contract more readable.

(2) Determine whether captions or headings should be disclaimed as guides to interpretation of contract.

d. Law that will govern contract [*see* § 75.273].

(1) Jurisdictions having contacts with contract.

(2) In absence of choice of law provision in contract itself, jurisdiction's law that would govern contract.

(3) If more than one jurisdiction may potentially be involved, what law should govern.

(a) Contract conforms to all requirements of that law.

(b) Contacts with that jurisdiction are sufficient so that choice of law would be upheld by neutral forum.

5. Determine how contract should address questions relating to assignments [see § 75.280 et seq.].

- a. Client wishes to restrict assignment.
- b. Transfer by operation of law might defeat ban on assignment.
- c. Contract could contain express provision against transfer by operation of law.
- d. Assignability of given right or obligation might be governed by statute or public policy.

6. Determine whether contract will incorporate by reference any other document [see § 75.290].

7. Determine whether to specify required method of notice [see § 75.294].

Legal Topics:

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

Contracts LawContract Conditions & ProvisionsGeneral OverviewContracts LawFormationGeneral Overview



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27-75 California Legal Forms--Transaction Guide §§ 75.117-75.129

[Reserved]

§§ 75.117[Reserved]



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27-75 California Legal Forms--Transaction Guide § 75.130

§ 75.130 Preparation of Outline

1. Using facts, documents, and preliminary determinations, outline mutual promises of parties.
2. Test outline.
 - a. Contract is workable as outlined.
 - b. Contract is complete, with provisions for all possibilities.
 - c. Contract is arranged in logical and comprehensible order.
 - d. Contract can be performed according to its terms.
 - e. Contract calls for performance that can be done in ordinary course of business.
 - f. Contract addresses all legal questions that are or may become involved.
 - g. Contract takes into account new or proposed legislation.
3. If contract is complex or there is any uncertainty over what client wishes to have included, discuss outline with client before drafting contract.

Legal Topics:

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

Contracts LawContract Conditions & ProvisionsGeneral OverviewContracts LawFormationGeneral OverviewContracts LawFormationDefinite Terms



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27-75 California Legal Forms--Transaction Guide § 75.131

§ 75.131 Preparation of Draft

1. Follow outline [*see* § 75.130].
2. Organize contract logically, so that its structure will be clear to all readers.
 - a. Use numbered paragraphs or sections with accurate captions.
 - b. Group together provisions dealing with similar topics or issues.
 - c. Avoid repetition of promise or statement; but if repetition is unavoidable, use exactly same language in each case.
3. Determine exactly what each provision should mean.
4. State parties' intention clearly and accurately.
 - a. Choose words that accurately convey idea to be expressed.
 - b. Consider whether any words used have more than one meaning, or might be ambiguous in context in which they are used.
 - c. If it is necessary to use word with more than one possible meaning, define it to limit it to desired meaning.
 - d. Be consistent in use of words.

e. Take care that general words are not restricted by specific words or particular descriptions elsewhere in contract [see § 75.291].

5. Use simplest and most direct language possible to convey desired ideas.

a. Consider whether contract would be reasonably clear to persons other than attorneys.

b. Use ordinary, simple words whenever possible.

c. Avoid legal jargon such as "party of the first part," "heretofore," and so forth.

d. Do not use any legal or technical term without fully understanding what it means.

e. Avoid long sentences.

f. Prefer nouns in lieu of pronouns.

6. Be very careful in use of punctuation.

NOTE:

Punctuation is always subordinate to text and never allowed to control its meaning [*Stoddart v. Golden* (1919) 179 Cal. 663, 664, 178 P. 707] ; but if the text is ambiguous, punctuation may be the controlling guide [*Travelers Indemnity Co. v. Pray* (6th Cir. 1953) 204 F.2d 821, 824] .

7. Describe parties by adopting brief designations [see § 75.220].

8. Use special size or style of type to highlight important points.

9. If it is possible that third person might claim benefits under contract, make it clear that person is either granted or denied right to enforce contract.

Legal Topics:

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

Contracts LawContract Conditions & ProvisionsGeneral OverviewContracts LawFormationGeneral Overview



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27-75 California Legal Forms--Transaction Guide § 75.132

§ 75.132 Revision of Draft

1. Reread draft.
2. Compare it with outline.
3. Make sure that all parts are in harmony.
4. Be sure that contract is clear and carries out intentions of client.
5. Confirm elimination of every meaning but desired one, because contract may be subjected to hostile interpretation.
6. Have client read draft.
7. In revising draft, be sure that changes do not introduce inconsistencies.

Legal Topics:

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

Contracts LawContract Conditions & ProvisionsGeneral OverviewContracts LawFormationGeneral Overview



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27-75 California Legal Forms--Transaction Guide § 75.133

§ 75.133 Contract Negotiations

1. Be prepared.
2. Take detailed notes of negotiations, including:
 - a. Time and place.
 - b. Persons present.
 - c. Proposals and concessions.
 - d. Any changes to language of draft of contract.
3. Always clearly indicate any changes in draft submitted by another attorney.
 - a. Mark changes on draft submitted.
 - b. Include description of changes with any new draft.
 - c. Submit new draft with additions underlined and deletions crossed out.
4. Try to work from first draft, even if submitted by other attorney, unless it is so bad or so unsuitable to client's objectives that it is unusable.

Legal Topics:

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

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27-75 California Legal Forms--Transaction Guide § 75.134

§ 75.134 Preparation and Review of Final Draft

1. Prepare final draft of contract, incorporating any changes to original draft.
2. Proofread it.
3. Be sure that all blanks are completed as intended.
4. Verify all dates.
5. Verify all cross references.
6. Verify all figures for accuracy.
7. Assemble all exhibits; attach and identify them as provided in contract.
8. Be sure that contract is legible or print is readable.
9. Be sure that language, location, and type size of contract provisions conform to any statutory requirements.

Legal Topics:

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

Contracts LawContract Conditions & ProvisionsGeneral OverviewContracts LawFormationGeneral Overview



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27-75 California Legal Forms--Transaction Guide § 75.135

§ 75.135 Execution

1. Have parties sign at end of contract [see § 75.295].

NOTE:

If the contract is to be transmitted or "signed" electronically, counsel should review the discussion of electronic contracts and signatures in § 75.17.

2. Specify legal status or capacity of any party who is not principal and is signing in representative capacity.
 - a. Agent.
 - b. Attorney-in-fact.
 - c. Employee.
 - d. Executor.
 - e. Administrator.
 - f. Guardian.
 - g. Conservator.
 - h. Trustee.

i. Other.

3. Obtain two witnesses for any signature by mark.

NOTE:

A signature or subscription may be made by a mark if the one signing cannot write. This person's name is then written near the mark by another who signs as a witness. There must be two subscribing witnesses [*Civ. Code* § 14; *Code Civ. Proc.* § 17(a); *Penal Code* § 7; *Rev. & Tax. Code* § 18].

4. If parties are not executing contract at same time and place, be sure that contract or accompanying cover letter states whether contract is binding from time first party signs or is binding only after all parties have signed.

5. State in contract how many executed copies were made.

6. If it is necessary or desirable that contract be acknowledged or its execution proved (as with deed, for example), prove or acknowledge it [*see Civ. Code* § 1180 *et seq.*; Ch. 27, *Deeds and Recording*].

7. Be sure that each party receives executed contract.

8. Keep copy.

Legal Topics:

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

Contracts LawContract Conditions & ProvisionsGeneral OverviewContracts LawFormationExecution



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27-75 California Legal Forms--Transaction Guide §§ 75.136-75.139

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D. Related and Subsequent Procedures

27-75 California Legal Forms--Transaction Guide § 75.140

§ 75.140 Recording

1. Determine whether contract must or should be recorded [see Ch. 27, *Deeds and Recording*].

NOTE:

Any instrument that affects title to or possession of real property may be recorded with the appropriate county recorder [Gov. Code § 27280(a)]. Any grant or conveyance of real property that is not recorded will be void as against any subsequent bona fide purchaser or encumbrancer who duly records the instrument by which he or she acquired a title or lien [Civ. Code §§ 1107, 1214].

2. If recording is desired or required, submit executed and acknowledged contract for recording.

NOTE:

Instruments must be recorded by the county recorder of the county in which the real property affected by the instrument is located [Civ. Code § 1169]. An instrument is deemed to be recorded when, being duly acknowledged or proved and certified, it is deposited in the recorder's office, with the proper officer, for record [Civ. Code § 1170]. For further discussion of the recording of instruments affecting real property, see California Real Estate Law and Practice, Ch. 82, ***Recording of Instruments*** (Matthew Bender).

3. If contract is subsequently canceled, terminated, or disaffirmed, consider whether instrument acknowledging that fact should be recorded.

NOTE:

If a contract affects title to or possession of real property, then a declaration of the cancellation, termination, or disaffirmance of that contract should probably be recorded, especially if the contract itself

was recorded. Otherwise the contract will be a cloud on the title.

Legal Topics:

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

Contracts LawContract Conditions & ProvisionsGeneral OverviewContracts LawFormationGeneral Overview



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27-75 California Legal Forms--Transaction Guide § 75.141

§ 75.141 Maintain Follow-Up System

1. Watch for changes in the law.
2. Be alert to exercise of any options or other rights within time allowed.
3. Be sure that any necessary performance is rendered within time allowed.
4. Be sure that client is aware of any right to rescind or terminate or any other right that arises because of other party's failure to take some act within time required.
5. Keep in mind expiration date of contract, and be sure that client knows when this date is approaching.

Legal Topics:

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

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27-75 California Legal Forms--Transaction Guide §§ 75.142-75.199

[Reserved]

§§ 75.142[Reserved]



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27-75 California Legal Forms--Transaction Guide § 75.200

§ 75.200 Formal Contract**[1] Comment--Use of Form**

The form in [2], *below*, is a very general sample form for a complete contract. This form illustrates a more formal drafting style, as opposed to the informal letter agreement style illustrated in § 75.201[2]. It contains space for inclusion of all the essential elements of a contract, as discussed in § 75.11, and illustrates one commonly used format for arrangement of the various elements of a contract. It also includes various standard types of contract provisions [see § 75.220 et seq.] that typically appear in many contracts.

[2] FORM**Formal Contract**

_____ [title, if desired]

This contract is made _____ [date] between _____ [name of first party],
 _____ [status and capacity if other than individual, e.g., a California corporation or as executor of the
 estate of _____ (name), deceased], _____ [whose address is _____
 (specify, if relevant)], referred to as " _____ " [abbreviated reference for identification in context, e.g.,
 "Buyer"] and _____ [similarly designate and describe each other party to contract].

[Optional]

[Include recitals, if desired, as set forth below; inclusion of recitals is not required for a valid and effective contract,
 and is a matter of the drafter's preference (see § 75.221)]

Recitals

_____ [include statement regarding identity of first party, e.g., Buyer is a California corporation operating as a wholesale distributor of sports cards and memorabilia].

_____ [include statement regarding identity of each other party, e.g., Seller is a Delaware corporation operating as a manufacturer of licensed limited edition sports cards and other sports collectibles].

_____ [include one or more recitals regarding parties' respective underlying motive in forming agreement, e.g., Buyer and Seller wish to enter into an agreement under which Buyer will act as the exclusive wholesale distributor of Seller's products in California].

[Continue with the following:]

[Therefore,] [i]n consideration of the mutual promises set forth below, the parties agree as follows.

1. _____ [obligation of first party]. _____ [name or designation of first party] shall _____ [specify what first party agrees to do].

2. _____ [obligation of second party]. _____ [name or designation of second party] shall _____ [specify what second party agrees to do].

3. Conditions of Performance. _____ [specify any terms or conditions that will qualify or otherwise affect duties and obligations of either party.]

4. Indemnification. _____ [first party] will indemnify and defend _____ [second party] from all liability for any loss, damage, or injury to persons or property arising from or related to the performance of this agreement, including without limitation all consequential damages, whether or not resulting from the negligence of _____ [second party] or any agent.

5. Termination. _____ [name of obligee] may terminate this agreement by giving written notice of termination to _____ [name of obligor] if _____ [name of obligor] should:

- (a) Be adjudged a bankrupt;
- (b) Become insolvent or have a receiver of assets or property be appointed because of insolvency;
- (c) Make a general assignment for the benefit of creditors;
- (d) Default in the performance of any obligation or the payment of any indebtedness under this contract;
- (e) Allow any judgment to remain unsatisfied and unbonded for 30 days or longer;
- (f) Institute or allow to be instituted any proceeding for the reorganization or rearrangement of financial affairs.

This right of termination may be exercised without prejudice to any other remedy to which _____ [name of obligor] may be entitled at law or under this contract.

6. Attorneys' Fees. If any _____ [legal action or *specify more limited provision, e.g., legal action based in contract law*], including an action for declaratory relief, is brought to enforce or interpret the provisions of this contract, the prevailing party shall be entitled to recover reasonable attorneys' fees from the other party. These fees, which may be set by the court in the same action or in a separate action brought for that purpose, are in addition to any other relief to which the prevailing party may be entitled. _____ [Add if appropriate: This provision applies to the entire contract or This provision applies only to actions to enforce _____ (*describe portions of contract covered by provision*).] Each party was represented by an attorney in the negotiation and execution of the agreement.

7. Entire Agreement. This contract supersedes any and all other agreements, whether oral or in writing, between the parties with respect to the subject of this contract. This contract contains all of the covenants and agreements between the parties with respect to the subject of this contract, and each party acknowledges that no representations, inducements, promises, or agreements have been made by or on behalf of any party except the covenants and agreements embodied in this contract. No agreement, statement, or promise not contained in this contract shall be valid or binding on the parties with respect to the subject of this contract.

8. Governing Law. The validity of this contract and each of its terms and provisions, as well as the rights and duties of the parties under this contract, shall be construed pursuant to and in accordance with the law of _____ [*specify jurisdiction, e.g., the State of California*].

9. Assignment. _____ [*name of party*] has the right to sell, assign, or transfer this contract to any person, firm, or corporation at any time during the term of this contract.

10. Severability. A breach of any provision of this contract shall not affect the right of _____ [*identify party*] to recover for any other breach of this contract. If any term of this contract is held by a court of competent jurisdiction to be void or unenforceable, the remainder of the contract terms shall remain in full force and effect and shall not be affected.

Executed in _____ [*specify number of executed copies, e.g., triplicate*] on _____ [*date*]
at _____ [*city and state*].

[signature of first party]
[typed name]

[signature of second party]
[typed name]

Legal Topics:

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

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27-75 California Legal Forms--Transaction Guide § 75.201

§ 75.201 Letter Agreement**[1] Comment--Use of Form**

The form in [2], *below*, illustrates a simple contract in letter agreement format. A letter agreement is frequently used in lieu of a more formal contract such as that illustrated in § 75.200. The parties should bear in mind that use of a letter could imply that the sender is the offeror. In addition, under a general rule of contract interpretation, a letter would be construed against the sender (the party that drafted the contract) to resolve any ambiguity [*see Civ. Code § 1654*].

Letter agreements can vary widely in the amount of detail and specificity included. At a minimum, all the essential elements of a contract, as discussed in § 75.11, should be specified. It is recommended, however, that letter agreements also contain standard provisions of the type typically included in more formal contracts such as that illustrated in § 75.200, to the extent that those provisions reflect the agreement of the parties.

[2] FORM**Letter Agreement**

_____ [date]

Dear _____ [name of party] :

This letter summarizes the agreement that I believe we have reached after _____ [include reference to negotiations between parties, e.g., our meeting on _____ (time and date) and several subsequent telephone conversations]. As I understand it, we have agreed as follows:

1. _____ I agree to _____ [specify what author of letter agreement agrees to do].
2. _____ You agree to _____ [specify what other party to letter agreement agrees to

do).

3. _____[specify all terms and conditions of contract as agreed to by the parties, using separate numbered paragraphs as necessary; include standard provisions of the type illustrated in § 75.200[2] as appropriate to reflect the agreement of the parties].

If the above correctly expresses your understanding of the terms of our agreement, please sign, date, and return to me the enclosed copy of this letter in the stamped envelope that I have enclosed for your convenience.

_____ [signature of sender]

[typed name]

Accepted and agreed to on _____ [date]

_____ [signature of recipient]

[typed name]

Legal Topics:

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

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27-75 California Legal Forms--Transaction Guide §§ 75.202-75.209

[Reserved]

§§ 75.202[Reserved]



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27-75 California Legal Forms--Transaction Guide § 75.210

§ 75.210 Offer

[1] Comment

[a] Use of Form

The forms in this section consist of several alternative provisions illustrating offers for bilateral and unilateral contracts. For a discussion of bilateral and unilateral contracts, see § 75.12[2].

The form in [2], *below*, illustrates offers of bilateral contracts. These provisions are designed for use in any transaction that begins with the communication of an offer for a bilateral contract. The forms are general and illustrative; they may be adapted to fit the situation.

The form in [3], *below*, illustrates offers of unilateral contracts. The first alternative is a formal offer of a unilateral contract. It is stated in general terms, for a simple unilateral contract. The second alternative is a reward offer. In order for an act to be a valid acceptance of a reward or other offer of a unilateral contract, the performing party must have some knowledge of the offer [*Hewitt v. Anderson* (1880) 56 Cal. 476, 477] .

[b] Intent to Contract

The offeror must have the intent to contract. If a purported offer, under the circumstances, should indicate that the apparent offeror did not intend to create a contract, then the so-called offer cannot be the basis of a contract. An offer made in jest, for example, cannot support a contract, even if accepted [*Fowler v. Security-First Nat. Bank* (1956) 146 Cal. App. 2d 37, 47, 303 P.2d 565] . Furthermore, if the offeree should reasonably understand from the circumstances that the offeror had no intention to contract, acceptance of the offer does not create an enforceable contract [*Scott v. Lee* (1962) 208 Cal. App. 2d 12, 15, 24 Cal. Rptr. 824 ; see § 75.214[1]].

[c] Certainty and Definiteness

An offer must express the terms of the contract with reasonable certainty; otherwise, it cannot be the basis for a contract

[*Goldberg v. City of Santa Clara* (1971) 21 Cal. App. 3d 857, 861, 98 Cal. Rptr. 862 ; *White Point Co. v. Herrington* (1968) 268 Cal. App. 2d 458, 465, 73 Cal. Rptr. 885] . In general, the terms of a contract are reasonably certain if they furnish a basis for determining the existence of a breach and for giving an effective remedy. Stating an offer in formal language with words like "offer" and "promise" could help make it clear that the proposal is an offer to contract and not a mere suggestion.

[2] FORM--Offer of Bilateral Contract

Offer of Bilateral Contract

I, _____ [name of offeror], hereby offer to _____ [specify terms of offeror's promise]
if you agree to _____ [specify terms of offeree's promise].

[EITHER]

In order to accept this offer, you must _____ [specify required manner and time of acceptance, e.g.,
notify me by return mail before June 1 or send me a telegram accepting my offer within 30 days of the date on this offer
or deposit \$10,000 in escrow with XYZ Title Co. no later than December 24].

[OR]

This offer may be accepted only by giving written notice of acceptance to _____ [me or name of
offeror] before _____ [date]. Acceptance shall not be effective until it is received by
_____ [me or name of offeror].

[OR]

If the terms of our agreement as set out in this letter are satisfactory to you, and if you agree that this letter expresses our entire agreement on this subject, please show your acceptance of this offer by signing this letter in the space indicated below. Your signature on this letter will create a contract binding and effective between us.

[Continue with the following]

_____ [date]

_____ [signature of offeror]

[typed name]

[3] FORM--Offer of Unilateral Contract

Offer of Unilateral Contract

I, _____ [name of offeror], _____ [offer to _____ (specify terms of
offer, e.g., pay you \$50) if you will _____ (specify terms of performance, e.g., trim my shrubbery) or
offer to pay a reward of \$ _____ for _____ (specify object of reward, e.g., the return
of my cat, named Bert)].

_____ [date]

_____ [*signature of offeror*]
[*typed name*]

Legal Topics:

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

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27-75 California Legal Forms--Transaction Guide § 75.211

§ 75.211 Revocation or Withdrawal of Offer

[1] Comment

[a] Use of Form

The form in [2], *below*, is an example of a simple revocation of an offer, which may be mailed or delivered to the offeree.

[b] Right of Revocation

An offer may be revoked at any time before acceptance of that offer is communicated to the offeror, but not after acceptance [*Civ. Code § 1586*]. This is true even if the offeror has promised to keep the offer open for a stated period [*Bellasi v. Shackelford* (1962) 201 Cal. App. 2d 265, 267, 19 Cal. Rptr. 925]. However, see exceptions in [d], *below*.

[c] Methods of Revocation

An offer may be revoked by any of the following means:

- A notice of revocation may be communicated from the offeror to the offeree [*Civ. Code § 1587(1)*; *but see CPI Builders, Inc. v. Impco Technologies, Inc.* (2001) 94 Cal. App. 4th 1167, 1173-1174, 114 Cal. Rptr. 2d 851 (offeror's communication of revocation to offeror's attorney did not revoke offer when offeror's attorney did not notify offeree's attorney of revocation before offeree accepted)]. The notice may be communicated by any act or omission of the offeror intended to communicate the notice, or by any act or omission that necessarily tends to communicate the revocation [*Civ. Code §§ 1581, 1587(1)*].
- An offer automatically terminates after the lapse of the time prescribed in the offer for its acceptance. If no time is fixed, the offer terminates after a reasonable time elapses without communication of acceptance [*Civ. Code § 1587(2)*].

■ An offer is revoked if the accepting party fails to fulfill a condition precedent to acceptance [Civ. Code § 1587(3)].

■ An offer is revoked by the death or insanity of the offeror [Civ. Code § 1587(4); *Bard v. Kent* (1942) 19 Cal. 2d 449, 451-452, 122 P.2d 8] .

[d] Exceptions

If an option is granted for consideration, then the offer that is the subject of that option must be kept open [see *Wheat v. Morse* (1961) 197 Cal. App. 2d 203, 206, 17 Cal. Rptr. 226 ; § 75.13].

A partly performed unilateral contract is irrevocable [*Aronowicz v. Nalley's, Inc.* (1972) 30 Cal. App. 3d 27, 43-44, 106 Cal. Rptr. 424] .

A subcontractor may not revoke a bid after a general contractor has relied on that bid to submit its bid [*Drennan v. Star Paving Co.* (1958) 51 Cal. 2d 409, 414-415, 333 P.2d 757] .

Certain offers are made irrevocable by statute or regulation. Most important of these is a firm offer by a merchant to buy or sell goods if the offer by its terms gives assurance that it will be held open. No consideration need be given [Com. Code § 2205(a); see Ch. 52, *Sales of Goods Under the Uniform Commercial Code*].

[2] FORM

Revocation or Withdrawal of Offer

I, _____[*name of offeror*], hereby revoke the offer I made to you on _____[*date*], in which _____[*describe terms of offer*]. Any acceptance attempted after this notice of revocation is mailed shall have no force or effect.

_____[*date*]

_____[*signature of offeror*]

[*typed name*]

Legal Topics:

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

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27-75 California Legal Forms--Transaction Guide § 75.212

§ 75.212 Rejection of Offer

[1] Comment--Use of Form

The form in [2], *below*, illustrates a formal rejection of an offer. A definite and communicated rejection terminates an offer [*Stanley v. Robert S. Odell and Co. (1950) 97 Cal. App. 2d 521, 534, 218 P.2d 162*], and the offer may not be subsequently accepted [*Landberg v. Landberg (1972) 24 Cal. App. 3d 742, 757, 101 Cal. Rptr. 335* ; *Stanley v. Robert S. Odell and Co. (1950) 97 Cal. App. 2d 521, 534, 218 P.2d 162*], unless the offeror has provided in the offer that it will not be terminated by a rejection [see *People v. Twedt (1934) 1 Cal. 2d 392, 397, 35 P.2d 324* (counteroffer would not terminate original offer if offeror in offer or offeree in counteroffer provided that counteroffer will not terminate offer)].

[2] FORM

Rejection of Offer

I hereby reject the offer of _____ [name of offeror] dated _____, concerning
_____ [specify subject of offer].

_____ [date]

_____ [signature of offeree]
[typed name]

Legal Topics:

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

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27-75 California Legal Forms--Transaction Guide § 75.213

§ 75.213 Rejection of Offer With Counteroffer**[1] Comment****[a] Use of Form**

The form in [2], *below*, is a rejection accompanied by a counteroffer. It may be used to reject the initial offer while keeping negotiations alive with the counteroffer. For discussion of the effect of a rejection, see § 75.212[1].

[b] Conditional Acceptance Distinguished

A conditional acceptance has the same effect as a rejection and counteroffer [*Landberg v. Landberg* (1972) 24 Cal. App. 3d 742, 750-752, 757, 101 Cal. Rptr. 335 ; see § 75.214[1][d]]. However, a conditional acceptance can be worded in a manner that keeps the original offer open, while a rejection necessarily terminates it [*Stanley v. Robert S. Odell and Co.* (1950) 97 Cal. App. 2d 521, 534, 218 P.2d 162 ; see § 75.212[1]]. The *form* in § 75.214[3] illustrates a conditional acceptance of an offer.

[2] FORM**Rejection of Offer With Counteroffer**

I reject your offer dated _____ concerning _____ [specify subject of offer]. I propose instead the following: _____ [specify terms of counteroffer].

If you find this proposal acceptable, please inform me _____ [specify desired time or manner of acceptance].

_____ [date]

_____ [signature of offeree]

[*typed name*]

Legal Topics:

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

Contracts LawFormationCounteroffersContracts LawFormationOffersRevocable Offers



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27-75 California Legal Forms--Transaction Guide § 75.214

§ 75.214 Acceptance

[1] Comment

[a] Use of Form

The forms in this section illustrate ways of accepting an offer for a bilateral contract. The form in [2], *below*, consists of alternative provisions for an unconditional acceptance of an offer. The first alternative identifies the offer being accepted by describing that offer. The second alternative identifies the offer being accepted by referring to a copy of that offer attached to the acceptance. The form in [3], *below*, consists of alternative provisions for a conditional acceptance. This type of acceptance is useful when the offeree desires to contract but wants changes in the proposed agreement. For related forms, see § 75.213 (dealing with rejections and counteroffers).

[b] Manner of Acceptance

Acceptance of an offer must be communicated to the offeror [*Civ. Code* §§ 1565, 1581; see § 75.11[2][c]]. The acceptance must comply with any conditions stated in the offer [*Civ. Code* § 1582; see § 75.11[2][d]] and should clearly and unequivocally accept the terms of the offer. Mere statements of intention or promissory words do not constitute an acceptance [*Devereaux v. Harper* (1962) 210 Cal. App. 2d 519, 525, 26 Cal. Rptr. 837 ; *American Aeronautics Corp. v. Grand Cent. Aircraft Co.* (1957) 155 Cal. App. 2d 69, 79, 317 P.2d 694] . For a contract provision specifying the manner of acceptance, see [4], *below*.

[c] Unqualified Acceptance

An acceptance must be absolute and unqualified. A qualified acceptance is considered a new proposal [*Civ. Code* § 1585]. If the terms of the offer are to be changed, see [d], *below*, or § 75.213 for discussion of the manner of making a counteroffer.

[d] Effect of Conditional Acceptance

A conditional acceptance is considered a new proposal [Civ. Code § 1585], and it has the effect of a rejection of the original offer and the making of a counteroffer [*Landberg v. Landberg* (1972) 24 Cal. App. 3d 742, 750-752, 757, 101 Cal. Rptr. 335 ; *Apablaza v. Merritt & Co.* (1959) 176 Cal. App. 2d 719, 726, 1 Cal. Rptr. 500 ; see, e.g., *Roth v. Malson* (1998) 67 Cal. App. 4th 552, 557-559, 79 Cal. Rptr. 2d 226 (when prospective buyer purported to accept seller's counteroffer by signing preprinted real estate form in space labeled "counter to counteroffer" and added terms in space labeled "changes/amendments," response was counter-counteroffer rather than acceptance, and no contract was formed)]. A conditional acceptance terminates the offeree's power to accept the original offer [*Landberg v. Landberg* (1972) 24 Cal. App. 3d 742, 757, 101 Cal. Rptr. 335] , unless the offeror in the offer or the offeree in the counteroffer provides that the counteroffer will not terminate the offer [*Landberg v. Landberg* (1972) 24 Cal. App. 3d 742, 757, 101 Cal. Rptr. 335] . The optional reservation in the second alternative in [3], below, is designed to take advantage of this right and preserve the power of acceptance.

[2] FORM--Acceptance

Acceptance

I _____ accept _____ [your offer dated _____, concerning _____ (specify subject matter of offer), and agree to or the attached offer on] the terms and conditions stated in that offer.

_____ [date]

_____ [signature of offeree]

[typed name]

[3] FORM--Conditional Acceptance

Conditional Acceptance

[EITHER]

I, _____ [name of offeree], hereby accept the offer of _____ [name of offeror] dated _____, concerning _____ [subject of offer], provided that _____ [name of offeror] agrees to the following changes: _____ [specify desired changes in terms of offer].

[OR]

By my signature below I accept the offer of _____ [name of offeror] dated _____, on condition that there must be at least _____ [number] responsible signatories to this contract.

[Continue with the following:]

[Optional]

This proposed acceptance is not a rejection of the original offer by _____ [name of offeror]. I reserve my right to accept that original offer if the terms of the conditional acceptance in this document are not acceptable to _____ [name of offeror].

[Continue with the following:]

_____ [date]

_____ [signature of offeree]
[typed name]

[4] FORM--Contract Provision Specifying Manner of Acceptance

Contract Provision Specifying Manner of Acceptance

This contract is not binding until accepted in writing by _____ [name of party] at
_____ [address]. No changes in or additions to this contract shall be effective until accepted in the
same way.

Legal Topics:

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

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27-75 California Legal Forms--Transaction Guide § 75.215

§ 75.215 Option

[1] Comment

[a] Use of Form

The forms in this section illustrate option agreements. An option is essentially an irrevocable offer, and "exercising the option" is an acceptance of that offer. For discussion of options, see § 75.13.

The form in [2], *below*, illustrates a complete option agreement for use as a separate document. The form in [3], *below*, illustrates an option clause that may be inserted into any appropriate contract. It is important to phrase carefully both the terms of the option and the manner of its exercise, so that the rights and duties of the parties are clear. The manner of exercise, once fixed, must be strictly followed [*Landberg v. Landberg* (1972) 24 Cal. App. 3d 742, 752-758, 101 Cal. Rptr. 335 ; see § 75.13[4]].

The form in [4], *below*, is a notice exercising an option. It is appropriate when the option agreement calls for exercise of the option by written notice [*Palo Alto Town & Country Village, Inc. v. BBTC Company* (1974) 11 Cal. 3d 494, 498, 113 Cal. Rptr. 705, 521 P.2d 1097] or when no particular means of exercise is required by the agreement [Civ. Code § 1581].

For real property options, see Ch. 22, *Options to Purchase Real Property* . For options in entertainment contracts, see Ch. 87, *Entertainment Contracts* .

[b] Nature of An Option

An option agreement is a contract to keep an offer open for a specified period. The option agreement must be supported by separate consideration; otherwise, it is not binding, and the offer may be revoked at any time, even if the agreement recites that the option was given for consideration received [*Warner Bros. Pictures v. Brodel* (1948) 31 Cal. 2d 766, 771-773, 192 P.2d 949 ; *Henry v. Lake Mill Lumber Co.* (1956) 139 Cal. App. 2d 620, 622, 293 P.2d 909 ; see § 75.13].

[c] Time of the Essence

Time is of the essence in an option agreement. If a time is set for the exercise of the option, and the deadline is not met, the optionee's rights under the option end. If no time is set, then the option must be exercised within a reasonable time [*Drewry v. Welch* (1965) 236 Cal. App. 2d 159, 167, 46 Cal. Rptr. 65 ; *Murfee v. Porter* (1950) 96 Cal. App. 2d 9, 18, 214 P.2d 543 ; see § 75.13[3]].

[2] FORM--Option Agreement**Option Agreement**

This contract is an option agreement between _____[*name of optionor*] ("Optionor"),
 _____[*address*], and _____[*name of optionee*] ("Optionee"),
 _____[*address*].

Optionor, in consideration of _____[*specify consideration, e.g., \$50*] received from Optionee, grants to Optionee the option to _____[*specify terms of option, e.g., buy a 1978 Ford pickup truck, license no. _____, currently owned by Optionor*]. [*Add statement of any other terms and conditions of option.*]

This option must be exercised _____[*specify term of option, e.g., not later than _____ (date) or within 90 days after the date set forth below*] by _____[*specify manner of exercise, e.g., the delivery of cash or a certified check in full payment*]. If this option is not exercised within the time required, it automatically and immediately terminates. This termination ends all rights of Optionee under this contract. No notice of termination is required.

_____ [date]

_____ [signature of optionor]

[typed name]

[3] FORM--Clause Granting Option**Clause Granting Option**

In consideration of _____[*specify consideration for option, e.g., the sum of \$5,000*] and the other obligations assumed by _____[*name of optionee*] under this contract, _____[*name of optionee*] has the right and option to _____[*specify terms of option*]. This option must be exercised _____[*specify duration of option, e.g., on or before _____ (date)*] by _____[*specify required manner of exercise, e.g., the tender of a promissory note for \$50,000*]. [*Add statement of any other terms and conditions of option.*]

[4] FORM--Exercise of Option**Exercise of Option**

Notice is hereby given that _____[*name of optionee*] exercises the option to
 _____[*describe terms of option*] granted by _____[*name of optionor*] on
 _____[*date of option offer*] and accepts the terms and conditions offered in that option.

_____ [date]

_____ [*signature of optionee*]
[*typed name*]

Legal Topics:

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

Contracts LawFormationGeneral OverviewContracts LawTypes of ContractsOption Contracts



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27-75 California Legal Forms--Transaction Guide §§ 75.216-75.219

[Reserved]

§§ 75.216[Reserved]



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 1. Preliminary Provisions

27-75 California Legal Forms--Transaction Guide § 75.220

§ 75.220 Identification of Parties

[1] Comment

[a] Use of Form

The form in [2], *below*, illustrates ways of designating and identifying the parties. There is no contract without parties capable of contracting [*Civ. Code* § 1550(1)], and it is essential to the validity of a contract that it be possible to identify the parties [*Civ. Code* § 1558]. If the authority or capacity of the contracting parties might become an issue, then that authority or capacity should be spelled out in the agreement.

[b] Individual

An individual would naturally be identified by name. Commonly something in addition, such as an address or a relationship, is used.

[c] Sole Proprietor

A sole proprietor making a business-related contract may be identified by name and a "doing business as" description (usually a business name), although a fictitious business name alone is sufficient for enforcement of a contract [*Williams v. Bronston* (1961) 190 Cal. App. 2d 812, 819, 12 Cal. Rptr. 463] as long as the responsible party can be identified from that name.

[d] Partnership

A partnership may contract in the partnership name [*Corp. Code* § 16301(1)] and may therefore be so designated as a party to a contract. Partnerships may also operate a business under another name, inasmuch as partnerships are able to form corporations [*Corp. Code* § 200(a)] or operate businesses under fictitious names [*Bus. & Prof. Code* §§ 17902, 17910]. If one of the contracting parties is a partnership that is operating a business under another name, and if that

business is relevant to the agreement, then the name of that business should be included in the description.

[e] Corporation or Limited Liability Company

It is sufficient to identify a corporation or limited liability company by the corporate name and the state of incorporation (or organization). It may be appropriate to include the principal place of business and the type of corporation (professional corporation or nonprofit corporation, for example).

[f] Representatives and Fiduciaries

If a party is acting in a representative or fiduciary capacity [*see generally Civ. Code § 2295 et seq.* (agency)] (for example, as an agent, administrator, executor, guardian, or trustee), that capacity should be specified. An agent who signs an agreement in his or her own name is personally liable unless the agent indicates on the writing his or her intention to bind only the principal [*Patterson v. John P. Mills Org., Etc., Inc.* (1928) 203 Cal. 419, 421-422, 264 P. 759 ; *London v. Zachary* (1949) 92 Cal. App. 2d 654, 657, 207 P.2d 1067] . An agent signing a contract in his or her own name is personally liable even when the agent has told the other party that he or she is acting for an undisclosed principal [*G.W. Andersen Construction Co. v. Mars Sales* (1985) 164 Cal. App. 3d 326, 331-333, 210 Cal. Rptr. 409 ; *Hollywood Nat. Bank v. Int'l Business Machines Corp.* (1974) 38 Cal. App. 3d 607, 617, 113 Cal. Rptr. 494] .

The use of a descriptive word alone (for example, "John Doe, agent") may not sufficiently show the limited capacity of the party as a mere representative. It is better to be specific (for example, "John Doe, agent for Joe Smith").

[g] Minors

A minor [*see Fam. Code § 6500* ("minor" is person under 18 years of age)] who is a party to a contract is subject to special rules. A minor has no capacity to contract concerning delegations of authority, real property, or personal property that is not in the minor's immediate possession or control [*Fam. Code § 6701*]. Although a minor otherwise has the capacity to contract [*see Fam. Code § 6700*], most contracts of a minor are subject to disaffirmance during minority or within a reasonable time after the minor becomes 18 years of age [*Fam. Code § 6710*]. A minor may *not* disaffirm the following types of contracts:

- Contracts to pay the reasonable value of things necessary for the support of the minor or the minor's family [*Fam. Code § 6712(a)*].
- Contracts to furnish artistic or creative services, either directly or through a third party, including but not limited to a personal service corporation (loan-out company), or through a casting agency, if approved by the appropriate superior court [*Fam. Code § 6750(a)(1)*; *see Fam. Code § 6751*].
- Contracts to buy or to dispose of a literary, musical, or dramatic property, or use of a person's likeness, voice recording, performance, or story of or incidents in the person's life, for use in the entertainment field, if approved by the appropriate superior court [*Fam. Code § 6750(a)(2)*; *see Fam. Code § 6751*].
- Contracts to participate in a sport, if approved by the appropriate superior court [*Fam. Code § 6750(a)(3)*; *see Fam. Code § 6751*].
- Any otherwise valid contract expressly authorized for minors by statute [*Fam. Code § 6711*]. Contracts expressly authorized by statute include certain contracts for the authorization of hospital or medical care [*see Fam. Code §§ 6920 et seq., 7050(e)(1)*] and life insurance, disability insurance, or annuity contracts [*Ins. Code § 10112*].

If a minor is employed or agrees to render services directly for any person or entity, the person or entity is considered the minor's employer for purposes of the rules relating to contracts with minors [*Fam. Code* § 6750(b)(1)]. If a minor's services are rendered through a third party individual or personal service corporation (loan-out company), the person or entity to which the third party is providing the minor's services is considered the minor's employer for purposes of those rules [*Fam. Code* § 6750(b)(2)].

An emancipated minor may contract as an adult [*Fam. Code* §§ 7050(e)(2), 7051]. An "emancipated minor" is a minor who either has entered into a valid marriage (even if the marriage has been dissolved), is on active duty with the United States armed forces, or has received a declaration of emancipation under *Fam. Code* § 7122 [*Fam. Code* § 7002].

For further discussion, see Ch. 100, *Control, Custody, and Support of Minors*, and Ch. 100B, *Contracts and Employment of Minors*.

[h] Incompetents

A person entirely without understanding has no power to contract but is liable for the reasonable value of things necessary for the support of the person or the person's family [*Civ. Code* § 38]. After a judicial determination of incapacity, a person of unsound mind can make no conveyance or other contract, nor can such a person delegate any power or waive any right, until capacity is restored [*Civ. Code* § 40(a)]. One who is of unsound mind but not entirely without understanding may enter into a binding contract before incapacity has been judicially determined, but that contract is subject to rescission as provided in *Civ. Code* § 1688 *et seq.* [*Civ. Code* § 39(a); see Ch. 77, *Discharge of Obligations*]. A judicial determination that a person is totally without understanding, or is of unsound mind, or suffers from mental deficits so substantial that, under the circumstances, the person should be deemed to lack the legal capacity to perform a specific act, should be based on evidence of a deficit in one or more of the person's mental functions rather than on a diagnosis of a person's mental or physical disorder [*Civ. Code* § 39(b)].

The appointment of a conservator of the estate [see *Prob. Code* § 1800 *et seq.*; Ch. 66A, *Conservatorships*] is an adjudication that the conservatee lacks the legal capacity to enter into any contract that binds or obligates the conservatorship estate [*Prob. Code* § 1872(a)]. Exceptions to this rule allow the conservatee to enter into contracts for the necessities of life [*Prob. Code* § 1871(d)], to make a will [*Prob. Code* § 1871(c)], and to control his or her allowance [*Prob. Code* § 1871(a)] and wages or salary [*Prob. Code* § 1871(b)]. Furthermore, a transaction that affects real property of the conservatorship estate, entered into by a person acting in good faith for valuable consideration and without knowledge of the establishment of the conservatorship, is not affected by any statute or order limiting the conservatee's capacity [see *Prob. Code* § 1870 *et seq.*], unless a notice of the establishment of the conservatorship, or temporary conservatorship, is recorded before the transaction in the county in which the property is located [*Prob. Code* § 1875]. However, the contractual capacity of the conservatee may be either broadened or restricted by court order [*Prob. Code* § 1873].

[i] Abbreviated References Parties

Parties may be assigned shorter names or role designations for convenience. For example, a party identified as "Lemuel Gulliver III" can be referred to elsewhere in the contract as "Gulliver" or "Buyer." References such as "the party of the first part" should be avoided; they are antiquated and confusing.

[2] FORM

Identification of Parties

[EITHER]

This contract is made on _____ [date] between _____ [name of individual] (referred to as _____ [abbreviated reference, e.g., "Buyer"]), whose address is _____ [specify], and _____ [designate and describe remaining parties].

[OR, for sole proprietor]

This contract is made on _____ [date] between _____ [name of individual] (referred to as _____ [abbreviated reference, e.g., "Buyer"]), doing business as _____ [business name] at _____ [specify address], and _____ [designate and describe remaining parties].

[OR, for general or limited partnership]

This contract is made on _____ [date] between _____ [name of partnership] (referred to as _____ [abbreviated reference, e.g., "Buyer"]), a _____ [California or specify other state] _____ [general or limited] partnership with its principal place of business at _____ [specify], and _____ [designate and describe remaining parties].

[OR, for corporation]

This contract is made on _____ [date] between _____ [name of corporation] (referred to as _____ [abbreviated reference, e.g., "Buyer"]), a _____ [California or other state of incorporation] corporation with its principal place of business at _____ [specify], and _____ [designate and describe remaining parties].

[OR, for limited liability company (LLC)]

This contract is made on _____ [date] between _____ [name of corporation] (referred to as _____ [abbreviated reference, e.g., "Buyer"]), a _____ [California or other state of formation] limited liability company with its principal place of business at _____ [specify], and _____ [designate and describe remaining parties].

[OR, for unincorporated association]

This contract is made on _____ [date] between _____ [name of association] (referred to as _____ [abbreviated reference, e.g., "Buyer"]), an unincorporated association with its principal place of business at _____ [specify], and _____ [designate and describe remaining parties].

[OR, for guardian or conservator]

This contract is made on _____ [date] between _____ [name of guardian or conservator] (referred to as _____ [abbreviated reference, e.g., "Buyer"]), as _____ [guardian or conservator] of the [person and] estate of _____ [name of minor or

conservatee], a _____ [minor or conservatee], and _____ [designate and describe remaining parties].

[OR, for trustee]

This contract is made on _____ [date] between _____ [name of trustee] (referred to as _____ [abbreviated reference, e.g., "Buyer"]), as trustee of _____ [describe trust, e.g., the John W. Smith Family Trust or the trust established by _____ (name of settlor) under a _____ (will or trust agreement) dated _____ (date)], and _____ [designate and describe remaining parties].

[OR, for executor or administrator]

This contract is made on _____ [date] between _____ [name of executor or administrator] (referred to as _____ [abbreviated reference, e.g., "Buyer"]), as _____ [executor or administrator] of the estate of _____ [name of decedent], and _____ [designate and describe remaining parties].

Legal Topics:

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



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27-75 California Legal Forms--Transaction Guide § 75.221

§ 75.221 Recitals

[1] Comment

[a] Use of Form

The form in [2], *below*, illustrates a preliminary paragraph in a contract to recite the background, basis, or purpose of the contract. Recitals in a contract can help to clarify the intentions of the parties. It is customary to place recitals immediately after the paragraph identifying the parties.

[b] Effect of Recitals

The facts recited in a written instrument are conclusively presumed to be true as between the parties to that instrument or their successors in interest [*Evid. Code* § 622; *Sanders Construction Co. v. San Joaquin First Fed. Sav. & Loan Assn.* (1982) 136 Cal. App. 3d 387, 395, 186 Cal. Rptr. 218]. This rule does not apply to recitals of consideration [see [c], *below*]. This conclusive presumption applies only to the essential facts necessary to determine the obligations of the contracting parties [*Taylor v. Lundblade* (1941) 43 Cal. App. 2d 638, 640, 111 P.2d 344 (applying former *Code Civ. Proc.* § 1962(2), repealed 1965; now see *Evid. Code* § 622); *Gas Appliance Sales Co. v. W. B. Bastin Mfg. Co.* (1927) 87 Cal. App. 301, 306, 262 P. 452] .

[c] Recital of Consideration

The mere existence of a written instrument is presumptive evidence of consideration [*Civ. Code* § 1614]. Consideration recited in an instrument is not conclusive, but it is *prima facie* evidence [*Louisville Title Ins. Co. v. Surety Title & Guar. Co.* (1976) 60 Cal. App. 3d 781, 792, 132 Cal. Rptr. 63] , and the consideration recited must be assumed to be the consideration if no rebuttal evidence is presented [*Kinsell v. Thomas* (1912) 18 Cal. App. 683, 692, 124 P. 220] . The trier of fact may find that the recital is more persuasive than oral evidence to the contrary [*Podesta v. Mehrten* (1943) 57 Cal. App. 2d 66, 70-74, 134 P.2d 38] .

Whether a recital of nominal consideration--for example, "for the sum of one dollar and other good and valuable consideration"--is sufficient to support a contract depends on what is meant by "nominal." The mere existence of a written instrument raises a rebuttable presumption of consideration, and the mere fact of recital is also rebuttable evidence of consideration. Because the burden of proving lack of consideration is on the party seeking to invalidate or avoid the contract [*Civ. Code* § 1615], recital of a nominal consideration will be enough if that party fails to offer evidence showing an absence of consideration [*Glickman v. Collins* (1975) 13 Cal. 3d 852, 861, 120 Cal. Rptr. 76, 533 P.2d 204] . However, if evidence is offered showing an absence of real consideration, the mere recital of a "nominal" consideration will not support a contract.

If the consideration is set out once in the contract, it is neither necessary nor customary to repeat the consideration for every promise in the contract [*Brickell v. Batchelder* (1882) 62 Cal. 623, 638 ; see *Civ. Code* § 1641].

[2] FORM

Recitals

[E.g., for option contract covering real property]

WHEREAS, Optionors own certain real property (referred to as "the Property") located in _____ County, California, consisting of approximately _____ acres fronting on _____ [name of frontage road], which is particularly described in Exhibit A attached to this contract and incorporated into this contract by this reference; and

WHEREAS, Optionee desires to obtain an exclusive irrevocable option to buy the Property, the option to remain open while Optionee determines the feasibility of building apartments on the Property; and

WHEREAS, Optionors are willing to grant an exclusive and irrevocable option to the Optionee on the terms and conditions set forth in this contract;

THEREFORE, in consideration of the mutual promises set forth below _____ [and the sum of \$ _____, receipt of which is hereby acknowledged], the parties agree as follows:

[Continue with body of contract]

Legal Topics:

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

Contracts LawContract Conditions & ProvisionsGeneral OverviewContracts LawFormationGeneral Overview



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27-75 California Legal Forms--Transaction Guide § 75.222

§ 75.222 Consideration**[1] Comment--Use of Form**

The form in [2], *below*, consists of several alternative provisions illustrating consideration clauses. Such a clause may be used, in lieu of a recital of consideration [see § 75.221] or in addition to a recital, when special consideration supports a particular promise. For a general discussion of consideration, see § 75.11[4].

[2] FORM**Consideration***[EITHER]*

_____*[paragraph number and topic]*. In consideration of _____*[specify consideration]*, _____*[name of promisor]* agrees to _____*[terms of agreement]*.

[OR, for payment of money]

_____*[paragraph number and topic]*. As consideration for _____*[specify performance]*, _____*[name of performing party]* shall be entitled to compensation in the amount of \$_____ to be paid _____*[on completion of performance or at the rate of \$_____ per _____ (e.g., hour or week or year)]*.

[OR, for cancellation of claim]

_____**[paragraph number and topic]**_____. In consideration of the cancellation of the claim of
_____**[name of promisee]**_____ against _____**[name of promisor]**_____ in the amount of
\$_____, **[optional: arising out of _____ (specify basis for claim),]**
_____**[name of promisor]**_____ agrees to _____**[terms of agreement]**_____.

Legal Topics:

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

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27-75 California Legal Forms--Transaction Guide §§ 75.223-75.229

[Reserved]

§§ 75.223[Reserved]



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27-75 California Legal Forms--Transaction Guide § 75.230

§ 75.230 Condition Precedent

[1] Comment

[a] Use of Form

The form in [2], *below*, illustrates how to provide for a condition precedent, and may be used if performance or liability depends on the prior satisfaction of a condition.

[b] Conditional Obligation

A contractual obligation is a legal duty by which a person is bound to do or not to do a certain thing [*Civ. Code* §§ 1427, 1428]. An obligation is conditional if the rights or duties of any party depend on the occurrence of an uncertain event [*Civ. Code* § 1434]. For example, if A delivers goods to B on B's promise to pay A \$100 if and when B's ship comes in, then A has a right to \$100 conditional on the arrival of B's ship.

The distinction between a conditional obligation and an unconditional obligation, called a covenant or promise [*see Diepenbrock v. Luiz* (1911) 159 Cal. 716, 718, 115 P. 743], is that a conditional obligation is excused if the condition does not occur [*Britschgi v. McCall* (1953) 41 Cal. 2d 138, 144, 257 P.2d 977], but a covenant is not necessarily excused by the failure of the other party to perform. The failure of an event that the promisor was expecting does not excuse performance of a covenant; but if the event was in the other party's control, the promisor may have an action for damages [*Starr v. Davis* (1930) 105 Cal. App. 632, 634-636, 288 P. 706].

Conditions may be precedent, concurrent, or subsequent [*Civ. Code* § 1435]. Conditions may be expressly stated in the contract [*Schwab v. Bridge* (1915) 27 Cal. App. 204, 207, 149 P. 603] or may be implied by law as necessary to achieve justice or to effect the intentions of the parties [*Wal-Noon Corp. v. Hill* (1975) 45 Cal. App. 3d 605, 611-612, 119 Cal. Rptr. 646].

[c] Condition Precedent

A condition precedent is one that is to be satisfied before some right dependent on it accrues, or before some act dependent on it is performed [Civ. Code § 1436]. An obligation dependent on a condition precedent does not accrue until that condition is satisfied, and an obligee cannot demand performance until that time [*Rubin v. Fuchs* (1969) 1 Cal. 3d 50, 54-55, 81 Cal. Rptr. 373, 459 P.2d 925] .

To create a condition precedent, the contract must express that condition clearly, because courts are not inclined to interpret the stipulations of a contract as conditions precedent [*Rubin v. Fuchs* (1969) 1 Cal. 3d 50, 53, 81 Cal. Rptr. 373, 459 P.2d 925] , especially if that interpretation would work a forfeiture or achieve inequitable results [Civ. Code § 1442; *Lucy v. Davis* (1912) 163 Cal. 611, 614, 126 P. 490] . However, the parties to a contract can agree to impose a condition precedent as long as the intent to do so is clear [*Sosin v. Richardson* (1962) 210 Cal. App. 2d 258, 264, 26 Cal. Rptr. 610 ; *Schwab v. Bridge* (1915) 27 Cal. App. 204, 207, 149 P. 603] .

[d] Implied Covenants and Conditions

Stipulations that are necessary to make a contract reasonable or conformable to usage will be inferred in respect to matters concerning which the contract shows no contrary intention [Civ. Code § 1655]. Even if there are no words of condition, a court may find that the parties intended that one's performance be conditional. For example, when an employer agreed to advance money to an employee to enable the employee to do certain work, the advancing of the money was held to be a condition precedent to the work even though no words of condition were used [*Woodruff Co. v. Exchange Realty Co.* (1913) 21 Cal. App. 607, 610, 132 P. 598] .

A covenant may be inferred if the following criteria are satisfied [*Lippman v. Sears, Roebuck and Co.* (1955) 44 Cal. 2d 136, 142, 280 P.2d 775] :

- It is necessary to effectuate the intention of the parties;
- It is clear from the language used that the provision was so clearly within their contemplation that the parties deemed it unnecessary to express it;
- It would have been inserted into the contract if attention had been called to it; and
- The subject is not completely covered by the contract.

A covenant will never be inferred contrary to the clear intent of the parties to create a condition [*Knight v. Black* (1912) 19 Cal. App. 518, 523, 126 P. 512] . If, however, it appears that the parties may have intended to make a covenant, then the use of words of condition will not prevent a court from finding a covenant. In determining such a matter, a court will consider the whole contract and the stipulations that the apparent condition qualified. The words of condition will be construed, as far as possible, to give effect to the entire contract [*Antonelle v. Lumber Co.* (1903) 140 Cal. 309, 318-319, 73 P. 966] .

[e] Substantial Performance

It is settled, especially in cases in which an owner has taken possession of the building and is enjoying the fruits of the builder's performance, that if there has been substantial performance in good faith, if the failure to make full performance can be compensated in damages to be deducted from the price or allowed as a counterclaim, and the omissions or deviations were not willful or fraudulent and do not affect the usefulness of the performance, the performing party may recover on the contract the amount of the contract price less damages for the failure in strict performance [*Thomas Haverty Co. v. Jones* (1921) 185 Cal. 285, 289, 197 P. 105 ; *Kossler v. Palm Springs Developments, Ltd.* (1980) 101 Cal. App. 3d 88, 101-102, 161 Cal. Rptr. 423] .

[2] FORM**Condition Precedent**

[EITHER]

_____**[paragraph number and topic]**_____. _____**[name of promisor]** promises to _____**[specify promised performance]**, provided that first, _____**[specify nature of condition]**.

[OR]

_____**[paragraph number and topic]**_____. The obligation of _____**[name of party]** to _____**[specify obligation subject to condition]** is conditioned on the prior performance by _____**[name of other party]** of _____**[specify terms of condition]**. If _____**[name of other party]** fails to perform, then _____**[specify effect, e.g., (name of party)]** will have no further obligation whatsoever].

[OR, for denial of condition]

_____**[paragraph number]**_____. No Conditions on Performance. The obligations of _____**[name of promisor]** are not conditioned on any performance by _____**[second party]**, and _____'s **[name of promisor]** sole remedy in the event of nonperformance shall be a suit for damages.

Legal Topics:

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

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27-75 California Legal Forms--Transaction Guide § 75.231

§ 75.231 Satisfaction as Condition Precedent

[1] Comment

[a] Use of Form

The form in [2], *below*, may be used to set satisfaction of a party or a third person as a condition precedent to a contractual obligation. For discussion of conditions precedent, see § 75.230[1].

[b] Satisfaction as Condition Precedent

A contract may condition a party's duty to perform on being satisfied with the other party's performance with some other circumstance. For example, a developer may condition the duty to buy real property on whether he or she can obtain satisfactory leases for a shopping center that is to be built on the land [*Mattei v. Hopper* (1958) 51 Cal. 2d 119, 121-124, 330 P.2d 625] . A requirement of this type is called a "satisfaction clause," and it does not make a contract illusory or lacking in consideration or mutuality of obligation [*Mattei v. Hopper* (1958) 51 Cal. 2d 119, 122-124, 330 P.2d 625 ; *Guntert v. City of Stockton* (1974) 43 Cal. App. 3d 203, 209, 117 Cal. Rptr. 601] .

[c] Objective or Subjective Test of Satisfaction

If the contract calls for satisfaction as to commercial value or quality, operative fitness, or mechanical utility, then the test is the objective one of whether a reasonable person would be satisfied. However, if the question is one of fancy, taste, or judgment, the only test is the good faith dissatisfaction of the party. Reasonableness is not at issue [*Mattei v. Hopper* (1958) 51 Cal. 2d 119, 122-124, 330 P.2d 625] . Although a satisfaction clause judged by this second test might seem to leave the contract lacking in mutuality of obligation, the courts find the obligation in the duty to make an honest, good faith judgment on the issue of satisfaction [*Mattei v. Hopper* (1958) 51 Cal. 2d 119, 122-124, 330 P.2d 625 ; *Locke v. Warner Bros., Inc.* (1997) 57 Cal. App. 4th 354, 364-365, 66 Cal. Rptr. 2d 921 (evidence raised triable issue of material fact as to whether studio had honest or good faith dissatisfaction with director's proposals in film-development deal)].

Which of the two tests applies to a given transaction is a question of intent. If there is no explicit language in the contract, then the law prefers the reasonable-person (objective) standard [*Guntert v. City of Stockton* (1974) 43 Cal. App. 3d 203, 209, 117 Cal. Rptr. 601 ; *Kadner v. Shields* (1971) 20 Cal. App. 3d 251, 262-263, 97 Cal. Rptr. 742] . Even contract language that seems to indicate an intent to use the subjective good faith test may be subject to reinterpretation through extrinsic evidence if the words are reasonably susceptible of different meanings [*Guntert v. City of Stockton* (1974) 43 Cal. App. 3d 203, 211, 117 Cal. Rptr. 601] .

The preference for the objective test means that a satisfaction clause must call for good faith, subjective satisfaction in the clearest and plainest terms if that test is to be applied. If the intent of the parties is clearly and definitely expressed, the subjective test could even be applied to a contract calling for commercial value or quality, operative fitness, or mechanical utility [*Kadner v. Shields* (1971) 20 Cal. App. 3d 251, 262, 97 Cal. Rptr. 742] .

[d] Satisfaction of Third Person

The parties may set the satisfaction of some third person as a condition precedent to performance. The determination of this third person is then conclusive, unless there is proof of fraud, error so gross as to amount to fraud, collusion, or obviously arbitrary action [*City Street Imp. Co. v. Marysville* (1909) 155 Cal. 419, 426-432, 101 P. 308 ; *C.J. Wood, Inc. v. Sequoia Union High School Dist.* (1962) 199 Cal. App. 2d 433, 436, 18 Cal. Rptr. 647 ; *Pacific Commercial Co. v. Greer* (1933) 129 Cal. App. 751, 756, 19 P.2d 543] . If the third person's satisfaction is to be manifested by a certificate, the third person may not arbitrarily withhold that certificate. If the third person is in fact satisfied, but does not issue the certificate, then the issuance of the certificate is no longer a condition precedent [*Coplew v. Durand* (1908) 153 Cal. 278, 281, 95 P. 38] .

The satisfaction clause generally operates to protect the party receiving performance, but a provision conditioning performance on the satisfaction of a third person is a danger to that party. As noted above, the third person's finding is generally conclusive in the absence of fraud, and the party receiving performance is estopped from seeking to hold the performing party liable for any defects in the performance [*City Street Imp. Co. v. Marysville* (1909) 155 Cal. 419, 426-432, 101 P. 308] .

[2] FORM

Satisfaction as Condition Precedent

[EITHER, when condition is subjective satisfaction]

_____ [paragraph number] . **Satisfactory Performance.** The obligation of _____ [name of party] to _____ [specify conditional performance] is conditioned on _____ [his or her or its] satisfaction with _____ [specify performance or event that must satisfy, e.g., the performance of the seller or the terms of the lease].

[OR, when condition is subjective satisfaction with operative fitness, mechanical utility, or commercial value or quality]

_____ [paragraph number] . **Satisfactory Performance.** The obligation of _____ [name of party] to _____ [specify conditional performance] is conditioned on _____ [his or her or its] satisfaction with _____ [specify performance or event that must satisfy]. _____ [name of party] shall have the sole right to determine whether _____ [he or she or it] is in good faith satisfied according to _____ [his or her or its]

own subjective standards, regardless of objective standards or the opinions of others.

[OR, when condition is objective satisfaction]

_____[**paragraph number**] . **Satisfactory Performance.** The obligation of _____[*name of party*] to _____[*specify conditional performance*] is conditioned on a satisfactory _____[*specify performance or event that must satisfy*]. In case of dispute, the determination of whether the _____[*specify performance or event that must satisfy*] is satisfactory shall be determined by the objective standard of whether a reasonable person would be satisfied.

[OR, when condition is satisfaction of third person]

_____[**paragraph number**] . **Satisfactory Performance.** The parties agree that all work under this contract must be performed to the satisfaction of _____[*name of third person*], and that _____[*he or she or it*] shall decide all questions as to the adequacy of _____'s [*name of party whose performance must be satisfactory*] performance. The obligation of _____[*name of second party*] to _____[*specify performance, e.g., pay*] shall not arise until _____[*name of third person*] is satisfied with _____'s [*name of party whose performance must be satisfactory*] performance. However, lack of objection by _____[*name of third person*] shall not constitute a waiver or estoppel for any cause of action that _____[*name of second party*] might have against _____[*name of party whose performance must be satisfactory*].

Legal Topics:

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

Contracts LawContract Conditions & ProvisionsGeneral OverviewContracts LawContract Conditions & ProvisionsConditions Precedent



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27-75 California Legal Forms--Transaction Guide § 75.232

§ 75.232 Concurrent Conditions

[1] Comment--Use of Form

The form in [2], *below*, may be used if performance or liability depends on concurrent conditions.

Concurrent conditions are those that are mutually dependent and are to be satisfied at the same time [*Civ. Code § 1437*]. Before any party to an obligation can require another party to perform any act under that obligation, he or she must fulfill all conditions precedent imposed on him or her. The party must also offer to fulfill all concurrent conditions imposed on him or her when the other party does the same. The party seeking to require performance must be able to fulfill the conditions that he or she offers to fulfill [*Civ. Code § 1439*]. For example, a contract for the sale of real estate may call for the deposit of money in escrow in exchange for the deposit of documents in escrow. The deposits are mutually dependent, and neither party can place the other in default unless he or she is fully able to perform or make a tender of performance [*Kossler v. Palm Springs Developments, Ltd. (1980) 101 Cal. App. 3d 88, 99, 161 Cal. Rptr. 423* ; *Landis v. Blomquist (1967) 257 Cal. App. 2d 533, 539, 64 Cal. Rptr. 865*] .

The failure of both parties to perform concurrent conditions does not leave the contract open for an indefinite period so that either party can tender performance at his or her leisure. Rather, the failure of both parties to perform concurrent conditions during the time for performance results in a discharge of both parties' duties to perform [*Pittman v. Canham (1992) 2 Cal. App. 4th 556, 559-560, 3 Cal. Rptr. 2d 340*] .

If all or part of the mutual performances due under a contract can be given simultaneously, then those performances are to that extent due simultaneously, unless the language or the circumstances indicate the contrary [*see Katemis v. Westerlind (1953) 120 Cal. App. 2d 537, 546, 261 P.2d 553*] . This means that many promises and conditions in typical contracts will be interpreted as imposing concurrent conditions, unless the contract is drafted to expressly provide otherwise.

[2] FORM

Concurrent Conditions

_____ **[paragraph number and topic]** . _____ **[name of promisor]** promises to
 _____ **[specify terms of promise]**, provided that _____ **[name of other party]**
 concurrently _____ **[specify terms of condition]**.

[OR]

_____ **[paragraph number and topic]** . At the time _____ **[name of party]**
 _____ **[performs the acts required under or pays the sum of \$ _____ as specified in]**
 Paragraph _____ of this agreement, _____ **[name of other party]** shall concurrently
 _____ **[specify terms of other party's promise, e.g., execute an assignment transfer of any and all**
interests of _____ (name) in the subject property, on the official government form for registering such
assignments].

Legal Topics:

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

Contracts Law Contract Conditions & Provisions General Overview Contracts Law Formation General Overview



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27-75 California Legal Forms--Transaction Guide § 75.233

§ 75.233 Condition Subsequent**[1] Comment--Use of Form**

The form in [2], *below*, may be used if a party's performance will be subject to a condition subsequent.

A condition subsequent is one referring to a future event on the happening of which the affected obligation becomes no longer binding on the party, if he or she chooses to avail himself or herself of the condition [*Civ. Code § 1438*]. That is, the occurrence of a condition subsequent discharges the duty that it conditions. A condition subsequent needs special care in drafting, because a condition involving a forfeiture is strictly construed against the party for whose benefit it is created [*Civ. Code § 1442*].

[2] FORM**Condition Subsequent**

_____**[paragraph number and topic]** . _____**[name of promisor]** promises to _____**[specify terms of promise, e.g., file a transfer of the vendor's permit currently on file with the City and County of San Francisco]**, provided that if and when _____**[name of other party]** should _____**[specify terms of condition, e.g., give written notice of intent to terminate that permit or to seek a issuance of a new permit under a different name]**, the obligation of _____**[name of promisor]** to perform shall be discharged.

Legal Topics:

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

Contracts Law Contract Conditions & Provisions Conditions Subsequent Contracts Law Formation General Overview



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27-75 California Legal Forms--Transaction Guide § 75.234

§ 75.234 Limitation of Liability

[1] Comment

[a] Use of Form

The form in [2], *below*, illustrates exculpatory clauses that may be used to limit a party's tort liability. For further discussion and another illustrative form, see Ch. 77, *Discharge of Obligations*.

[b] Validity

A contract clause limiting liability for negligence generally is valid [*Delta Air Lines, Inc. v. Douglas Aircraft Co.* (1965) 238 Cal. App. 2d 95, 100, 47 Cal. Rptr. 518 ; Civ. Code § 1667]. However, a contract is invalid if it attempts to exempt a person from responsibility for that person's own fraud, willful injury to another's person or property, or violation of law (whether willful or negligent) [Civ. Code § 1668; *see generally* § 75.11[3]].

An exculpatory provision is also invalid if the activity involved is affected by a public interest, that is, if the transaction exhibits some or all of the following characteristics [*Tunkl v. Regents of University of California* (1963) 60 Cal. 2d 92, 98-101, 32 Cal. Rptr. 33, 383 P.2d 441 ; *see Gavin W. v. YMCA of Metropolitan Los Angeles* (2003) 106 Cal. App. 4th 662, 671-674, 131 Cal. Rptr. 2d 168 (holding that agreement exculpating child care provider from its own negligence was void as against public policy and finding that contract involved public interest under *Tunkl* criteria)]:

- It concerns a business subject to public regulation.
- It involves service of great importance and necessity to the public.
- The service offered is open to members of the public generally.
- The essential nature of the service offered results in unequal bargaining power.

- The exculpatory clause is contained in a standard adhesion contract and there is no provision whereby a purchaser may pay reasonable additional fees and obtain protection from negligence.
- The person or property of the buyer is placed within the control of the party seeking exculpation and is subject to the risk of his or her carelessness.

Courts have found that recreational activities provided for seniors at a community center did not involve the public interest [*YMCA of Metropolitan Los Angeles v. Superior Court* (1997) 55 Cal. App. 4th 22, 26-27, 63 Cal. Rptr. 2d 612] . A contract containing a release holding a ski resort and its employees harmless for any injuries incurred as a condition of enrolling in a ski school did not affect the public interest [*Allan v. Snow Summit, Inc.* (1996) 51 Cal. App. 4th 1358, 1375-1376, 59 Cal. Rptr. 2d 813] . Furthermore, a release of all premises liability in consideration of permission to enter recreational and social facilities for any purpose does not violate public policy [*Benedek v. PLC Santa Monica, LLC* (2002) 104 Cal. App. 4th 1351, 1358-1359, 129 Cal. Rptr. 2d 197 (health club member who signed waiver of liability for all personal injuries sustained on premises "whether using exercise equipment or not" was injured by falling television)]. However, an agreement made in the context of sports or recreational programs or services, purporting to release anyone from liability for future gross negligence, generally is unenforceable as a matter of public policy [*City of Santa Barbara v. Superior Court (Janeway)* (2007) 41 Cal. 4th 747, 62 Cal. Rptr. 3d 527, 161 P.3d 1095, 2007 Cal. LEXIS 7603, at *3] .

[c] Enforceability

If an exculpatory provision includes both valid and invalid elements, it may be enforced to the extent that it is valid [*Werner v. Knoll* (1948) 89 Cal. App. 2d 474, 476-477, 201 P.2d 45] . To the extent that an exculpatory provision attempts to limit responsibility for fraud, it is invalid and is vitiated by the fraud [*Rothstein v. Janss Investment Corp.* (1941) 45 Cal. App. 2d 64, 72, 113 P.2d 465 ; *Civ. Code* § 1668].

The provision is not enforceable if the negligent act is a violation of a safety order or municipal ordinance [*Halliday v. Greene* (1966) 244 Cal. App. 2d 482, 488, 53 Cal. Rptr. 267 ; *Hanna v. Lederman* (1963) 223 Cal. App. 2d 786, 792, 36 Cal. Rptr. 150 ; see *Civ. Code* § 1668].

Exculpatory clauses in construction contracts are not enforceable if the party seeks a release from liability for the party's own or his or her agent's negligence or willful misconduct [*Civ. Code* § 2782(a)].

Exculpatory provisions also are unenforceable when a party attempts to obtain a release from responsibility for violation of a duty created by the same agreement [*Woodall v. Wayne Steffner Productions* (1962) 201 Cal. App. 2d 800, 817-818, 20 Cal. Rptr. 572 (claim of exemption from negligence in providing driver to stuntman was invalid because defendant had agreed to provide expert driver)].

[d] Strict Interpretation

Exculpatory or indemnity clauses that attempt to free a party from liability for negligence are strictly interpreted, but if the language is broad enough, a party may escape liability [*Queen Villas Homeowners Ass'n v. TCB Property Mgmt.* (2007) 149 Cal. App. 4th 1, 6, 56 Cal. Rptr. 3d 528 ("If parties go out of their way and say 'we really, really mean it,' language clearly contemplating exculpation may be enforced."); *Delta Air Lines, Inc. v. Douglas Aircraft Co.* (1965) 238 Cal. App. 2d 95, 100-101, 47 Cal. Rptr. 518] . The intent of the parties to include acts of affirmative negligence, as well as passive negligence, must be shown by clear, positive, and specific language [*Barkett v. Brucato* (1953) 122 Cal. App. 2d 264, 278, 264 P.2d 978] . An indemnity clause phrased in broad, general terms such as one covering "any suit at law for damages which might arise in connection with the agreed work" is sufficient to cover acts of passive negligence, such as the failure to discover a dangerous condition [*Markley v. Beagle* (1967) 66 Cal. 2d 951, 962, 59

Cal. Rptr. 809, 429 P.2d 129], but it will not cover acts of active negligence or strict liability in tort for marketing a defective product [*Price v. Shell Oil Co. (1970) 2 Cal. 3d 245, 256-258, 85 Cal. Rptr. 178, 466 P.2d 722*].

[e] Clauses Held Valid

Exculpatory clauses upheld as valid include the following:

- An agreement between an automobile dealer and a customer releasing the dealer from liability for the negligence of the dealer's employee in driving the customer's car [*Nichols v. Hitchcock Motor Co. (1937) 22 Cal. App. 2d 151, 160, 70 P.2d 654*].
- A lease relieving the landlord from liability to the tenant for negligent acts [*Mills v. Ruppert (1959) 167 Cal. App. 2d 58, 62, 333 P.2d 818*].
- An airplane sale agreement relieving the seller from liability to the buyer for the seller's negligence [*Delta Air Lines, Inc. v. Douglas Aircraft Co. (1965) 238 Cal. App. 2d 95, 100, 47 Cal. Rptr. 518*].
- A provision by which participants in a YMCA program agreed to release, waive, discharge, and not sue a community center for any personal injury arising from the YMCA's negligence regarding its premises, facilities, or equipment [*YMCA of Metropolitan Los Angeles v. Superior Court (1997) 55 Cal. App. 4th 22, 26-27, 63 Cal. Rptr. 2d 612; but see City of Santa Barbara v. Superior Court (Janeway) (2007) 41 Cal. 4th 747, 62 Cal. Rptr. 3d 527, 161 P.3d 1095, 2007 Cal. LEXIS 7603, at *3 (agreement made in context of sports or recreational programs or services, purporting to release anyone from liability for future gross negligence, generally is unenforceable as matter of public policy)*].
- A hybrid contractual waiver in an employment agreement that preserved an employee's claims against the corporate employer but waived the employee's right to sue the corporation's officers, directors, and shareholders for damages arising out of the employment agreement [*Farnham v. Superior Court (1997) 60 Cal. App. 4th 69, 77-78, 70 Cal. Rptr. 2d 85* (contractual provision was result of private, voluntary transaction in which employee retained right to seek redress from corporation)].

[f] Clauses Held Invalid

Exculpatory clauses that have failed include the following:

- A provision exempting a water district from liability for flooding [*Salton Bay Marina, Inc. v. Imperial Irrigation Dist. (1985) 172 Cal. App. 3d 914, 938-940, 218 Cal. Rptr. 839*].
- A provision exempting a charitable research hospital from liability to its patients for the negligence of its employees [*Tunkl v. Regents of University of California (1963) 60 Cal. 2d 92, 98-101, 32 Cal. Rptr. 33, 383 P.2d 441*].
- Agreements releasing medical specialists, who had superior bargaining power, from liability to patients [*Belshaw v. Feinstein (1968) 258 Cal. App. 2d 711, 726-727, 65 Cal. Rptr. 788*].
- An automobile sale in which strict liability overcame a retailer's disclaimer of liability [*Vandermark v. Ford Motor Co. (1964) 61 Cal. 2d 256, 263, 37 Cal. Rptr. 896; 391 P.2d 168*].
- A provision exculpating an escrow company from its negligent failure to comply with escrow instructions [*Akin v. Business Title Corp. (1968) 264 Cal. App. 2d 153, 156-159, 70 Cal. Rptr. 287*].

[2] FORM**Limitation of Liability**

[EITHER]

_____ [paragraph number]. **Release of Liability.** _____ [first party] agrees to release _____ [second party] from all liability arising from or related to _____ [describe transaction at issue]. This includes, but is not limited to, all liability for damages resulting from the active or the passive negligence of _____ [second party] or _____ [his or her or its] agents.

[OR]

_____ [paragraph number]. **Indemnity.** _____ [first party] will indemnify and defend _____ [second party] from all liability for any loss, damage, or injury to persons or property arising from or related to the performance of this contract, including, without limitation, all consequential damages, whether or not resulting from the negligence of _____ [second party] or _____ [his or her or its] agents.

Legal Topics:

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

Contracts LawContract Conditions & ProvisionsGeneral OverviewContracts LawContract Conditions & ProvisionsExculpatory ClausesTortsGeneral Overview



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27-75 California Legal Forms--Transaction Guide § 75.235

§ 75.235 *Force Majeure; Vis Major*; Act of God

[1] Comment--Use of Form

The form in [2], *below*, may be used when a party intends to be relieved from performance or from liability by reason of an insuperable interference, occurring without the party's intervention, that could not have been prevented by the exercise of prudence, diligence, and care [*Pacific Vegetable Oil Corp. v. C. S. T., Ltd. (1946) 29 Cal. 2d 228, 230, 238, 174 P.2d 441*] . This is common in building and construction contracts and also may be useful, for example, to protect a seller from liability for nondelivery of goods [see *Pacific Vegetable Oil Corp. v. C. S. T., Ltd. (1946) 29 Cal. 2d 228, 230, 238, 174 P.2d 441* (contract terminated and nondelivery of copra excused)].

Both *force majeure* (French for "superior strength") and the Latin equivalent *vis major*, as well as the commonly used phrase "act of God," may be used to mean a supervening impossibility of performance that serves as a defense to nonperformance. However, acts of God could include only occurrences attributable to irresistible or superhuman causes, while *force majeure* could extend to circumstances caused by human acts that are unforeseeable and incapable of being prevented. In California, nonperformance or delay is excused when prevented or delayed by an irresistible superhuman cause or by the act of public enemies of California or of the United States, unless the parties provide otherwise [Civ. Code § 1511(2)]. A contract condition is void if its fulfillment is impossible [Civ. Code §§ 1441, 1596].

The parties may draft a *force majeure* clause that shapes the consequences of an intervening impossibility to their specific needs and defines the excusing conditions. The provision can completely excuse performance [*Pacific Vegetable Oil Corp. v. C. S. T., Ltd. (1946) 29 Cal. 2d 228, 230, 238, 174 P.2d 441*] , suspend performance [*Rehart v. Klossner (1941) 48 Cal. App. 2d 46, 49-50, 119 P.2d 148*] , or apportion the costs of the loss [*Mathes v. City of Long Beach (1953) 121 Cal. App. 2d 473, 477, 263 P.2d 472*] .

[2] FORM

Force Majeure; Vis Major; Act of God

[EITHER, for performance excused]

_____ [paragraph number] . Act of God. If _____ [name of party] is prevented from performing _____ [his or her or its] obligations under this contract by an act of God or by any other occurrence that is beyond the control of the parties to this contract, then _____ [he or she or it] shall be excused from any further performance of _____ [his or her or its] obligations and undertakings under this contract.

[OR, for performance suspended]

_____ [paragraph number] . Act of God. If the performance by _____ [name of party] of any of _____ [his or her or its] obligations or undertakings under this contract is interrupted or delayed by any occurrence not occasioned by the conduct of either party to this contract, whether that occurrence is an act of God or public enemy, or whether that occurrence is caused by war, riot, storm, earthquake, or other natural forces, or by the acts of anyone not a party to this contract, then _____ [name of party] shall be excused from any further performance for whatever period of time after the occurrence is reasonably necessary to remedy the effects of that occurrence.

[OR, for loss apportioned]

_____ [paragraph number] . Act of God. If the performance by _____ [name of party] of any of _____ [his or her or its] obligations or undertakings under this contract is delayed or prevented by an act of God or by any other occurrence that is beyond the control of the parties to this contract, then the resulting loss shall be _____ [specify how loss will be apportioned].

Legal Topics:

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

Contracts LawContract Conditions & ProvisionsGeneral OverviewContracts LawFormationGeneral Overview



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[Reserved]

§§ 75.236[Reserved]



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27-75 California Legal Forms--Transaction Guide § 75.240

§ 75.240 Termination at Will

[1] Comment

[a] Use of Form

The form in [2], *below*, empowers a party to terminate the contract on notice. For further discussion of contract termination and additional forms, see Ch. 77, *Discharge of Obligations*.

[b] Definition

To "terminate" a contract is to abrogate as much of it as remains unperformed, doing away with an existing agreement on the terms and with the consequences stated in the agreement [*Grant v. The Aerodraulics Co. (1949) 91 Cal. App. 2d 68, 73, 204 P.2d 683* ; *Sanborn v. Ballanfonte (1929) 98 Cal. App. 482, 488, 277 P. 152*] .

Termination is different from rescission, which restores the parties to their former positions. This distinction is important in determining the right to damages. The party who validly terminates the contract retains the right to any damages for breach of the contract that have accrued up to the date of the termination, but the party who rescinds has no right to damages [*B.L. Metcalf General Contractor, Inc. v. Earl Erne, Inc. (1963) 212 Cal. App. 2d 689, 693-694, 28 Cal. Rptr. 382* ; see California Forms of Pleading and Practice, Ch. 490, *Rescission and Restitution* (Matthew Bender)].

A termination is not the same as an alteration. A written contract may be altered only by another written contract or an executed oral agreement [*Civ. Code § 1698*]. This rule does not apply to termination, which may be effected by an oral agreement, whether executed or not [*Grant v. The Aerodraulics Co. (1949) 91 Cal. App. 2d 68, 73, 204 P.2d 683*] .

[c] Validity

Examples of valid termination provisions include the following:

- A provision that gives one or both parties the option to terminate within a certain time or on specified conditions [see, e.g., *Zee Medical Distributor Assn. Inc. v. Zee Medical Inc.* (2000) 80 Cal. App. 4th 1, 14, 94 Cal. Rptr. 2d 829 (unambiguous language that contract would continue until grounds arose for termination was valid, express contractual term of duration; termination was only for cause, and not at will); *R.J. Cardinal Co. v. Ritchie* (1963) 218 Cal. App. 2d 124, 143, 32 Cal. Rptr. 545] .
- A provision allowing arbitrary termination, if coupled with a notice requirement, the duty to give notice being a sufficient detriment to create an enforceable obligation [*Mutz v. Wallace* (1963) 214 Cal. App. 2d 100, 111, 29 Cal. Rptr. 170] .
- A provision giving one party the right to terminate on the happening of a contingency over which that party has no control [*Pease v. Brown* (1960) 186 Cal. App. 2d 425, 432, 8 Cal. Rptr. 917] .
- A provision giving one party an election to terminate if dissatisfied with the other party's performance [*Wooton v. Dorr* (1948) 88 Cal. App. 2d 781, 784, 199 P.2d 345 ; but see *Call v. Alcan Pacific Co.* (1967) 251 Cal. App. 2d 442, 447, 59 Cal. Rptr. 763 (courts will impose standard of good faith or reasonableness in exercise of election to terminate for lack of satisfaction)].

A termination clause does not empower a party to terminate after wrongfully causing the other party's failure to perform, because a party cannot be allowed to profit by the party's own wrongdoing [*Mad River Lbr. Sales, Inc. v. Willburn* (1962) 205 Cal. App. 2d 321, 324, 22 Cal. Rptr. 918] .

[d] Sale of Goods

In the case of a sale of goods governed by the Commercial Code, a "termination" occurs when either party, pursuant to a power created by agreement or law, puts an end to the contract for a reason other than breach of contract. On termination, all obligations that are still executory on both sides are discharged, but any right based on a prior breach or prior performance survives [Com. Code § 2106(3)]. A "cancellation" occurs when either party puts an end to the contract for breach by the other. The effect is the same as that of a termination, except that the canceling party also retains any remedy for breach of the whole contract or any unperformed balance [Com. Code § 2106(4)]. For further discussion of the distinction between cancellation and termination in contracts for the sale of goods, see Ch. 52, *Sales of Goods Under the Uniform Commercial Code* , and Ch. 77, *Discharge of Obligations* .

[2] FORM

Termination at Will

_____ [paragraph number] . **Termination.** This contract may be terminated by either party at any time by giving _____ [specify time requirement, if any, e.g., 30 days] written notice to the other party.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts Law Performance Discharges & Terminations



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27-75 California Legal Forms--Transaction Guide § 75.241

§ 75.241 Termination for Cause

[1] Comment--Use of Form

The forms in this section are clauses permitting termination of the contract for cause, such as:

- Occurrence of a specific event [*see* [2], *below*].
- Unsatisfactory performance [*see* [3], *below*; see also § 75.231[1]].
- Other party's default [*see* [4], *below*].
- Other party's bankruptcy or insolvency, or occurrence of other specified acts related to that party's financial ability to perform [*see* [5], *below*].

Termination in any such case is optional under these clauses. For forms mandating termination on some specified date or event, see § 75.242. For general discussion of termination provisions, see § 75.240[1].

[2] FORM--Specific Event

Specific Event

_____ [*paragraph number*] . **Termination.** In the event that _____ [*specify event, e.g., renewal of financing is not obtained*], _____ [*name of party*] may terminate this contract by giving notice to _____ [*name of other party*] by registered mail.

[3] FORM--Unsatisfactory Performance

Unsatisfactory Performance

_____ **[paragraph number] . Termination.** If _____ *[name of party to whom performance is due]* becomes dissatisfied at any time with the performance of _____ *[name of performing party]* under this contract, then _____ *[name of party to whom performance is due]* may terminate this contract by giving written notice to _____ *[name of performing party]*. Termination will be effective _____ *[specify effective date of termination, e.g., on receipt of notice or 10 days after receipt of notice]*.

[4] FORM--Default

Default

[EITHER]

_____ **[paragraph number] . Termination.** If _____ *[name of obligor]* defaults in the performance of any term or condition of this contract, _____ *[he or she or it]* must cure that default by a satisfactory performance within _____ *[specify time, e.g., 10 days]* after service on _____ *[him or her or it]* of written notice of the default. If _____ *[name of obligor]* fails to cure the default within that time, then _____ *[name of obligee]* may terminate this contract without further notice.

[OR]

_____ **[paragraph number] . Termination.** If _____ *[name of obligor]* defaults in the performance of this contract or materially breaches any of its provisions, then _____ *[name of obligee]* may terminate this contract by giving written notice of termination by registered mail to _____ *[name of obligor]*. For the purposes of this paragraph, the following actions are material breaches of this contract: _____ *[specify]*.

[5] FORM--Bankruptcy, Insolvency, or Similar Event

Bankruptcy, Insolvency, or Similar Event

_____ **[paragraph number] . Termination.** (a) _____ *[name of obligee]* may terminate this contract at _____ *[his or her or its]* election by giving written notice of termination to _____ *[name of obligor]* if _____ *[name of obligor]* should:

- (1) Be adjudged a bankrupt;
- (2) Become insolvent or have a receiver of _____ *[his or her or its]* assets or property appointed because of insolvency;
- (3) Make a general assignment for the benefit of creditors;
- (4) Default in the performance of any obligation or the payment of any indebtedness under this contract;
- (5) Suffer any judgment against _____ *[him or her or it]* to remain unsatisfied and unbonded for 30 days or longer; or

(6) Institute or suffer to be instituted any proceeding for the reorganization or rearrangement of _____ [his or her or its] affairs.

(b) This right of termination referred to in (a), above, may be exercised without prejudice to any other remedy to which _____ [he or she or it] may be entitled at law or under this contract.

Legal Topics:

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

Contracts LawContract Conditions & ProvisionsGeneral OverviewContracts LawPerformanceDischarges & Terminations



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27-75 California Legal Forms--Transaction Guide § 75.242

§ 75.242 Automatic Termination**[1] Comment--Use of Form**

The form in [2], *below*, contains alternative clauses providing for the automatic termination of the contract on a specified date or on the happening of a specified event. Unlike the *forms in § 75.241*, which give one party the right to terminate the agreement on specified occurrences, the alternatives in this form require that the agreement be terminated on occurrence of the stated event.

[2] FORM**Automatic Termination**

[EITHER]

_____ **[paragraph number] . Termination.** This contract shall remain in force for a period of _____ *[specify period, e.g., five years]* and shall terminate automatically at the end of that period unless _____ *[specify condition, e.g., it is renewed in writing at least six months before the date set for termination]*.

[OR]

_____ **[paragraph number] . Termination.** This contract shall terminate automatically on the happening of any of the following events: _____ *[list terminating events, e.g., the death of a party or the insolvency of a party or the assignment of the agreement]*.

Legal Topics:

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

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27-75 California Legal Forms--Transaction Guide § 75.243

§ 75.243 Termination on Payment of Agreed Sum

[1] Comment

[a] Use of Form

The form in [2], *below*, provides for termination of the contract on the payment of an agreed sum. For general discussion of termination provisions, see § 75.240[1].

[b] Liquidated Damages Issues

A contract that provides for termination on payment of an agreed sum is generally considered to be an alternative contract; that is, a contract that allows for alternative means of performance, one of which is to pay a specified sum. Such a termination provision is valid and is not a provision for liquidated damages for breach of contract, because the payment made is a bargained-for, alternative performance, and there has been no breach of the contract when payment is made [*Western Camps, Inc. v. Riverway Ranch Enterprises* (1977) 70 Cal. App. 3d 714, 727, 138 Cal. Rptr. 918] . However, when it is manifest that a contract expressed in the alternative is in fact a contract contemplating but a single, definite performance with an additional charge contingent on the breach of that performance, the provision cannot escape examination in light of pertinent rules relevant to the liquidation of damages [*Blank v. Borden* (1974) 11 Cal. 3d 963, 970, 115 Cal. Rptr. 31, 524 P.2d 127 ; *Garrett v. Coast & Southern Fed. Sav. & Loan Assn.* (1973) 9 Cal. 3d 731, 735-738, 108 Cal. Rptr. 845, 511 P.2d 1197] . For discussion of the rules applicable to liquidated damages provisions, see § 75.251.

Alternative contracts that have been upheld include a contract allowing a lessor to terminate a lease on payment of a sum [*Western Camps, Inc. v. Riverway Ranch Enterprises* (1977) 70 Cal. App. 3d 714, 727, 138 Cal. Rptr. 918] , a withdrawal-from-sale clause in an exclusive-right-to-sell contract [*Blank v. Borden* (1974) 11 Cal. 3d 963, 970, 115 Cal. Rptr. 31, 524 P.2d 127] , and a loan of stock shares that permitted the borrower to return the stock or to keep the shares and pay the lender their value on the date lent [*Miller v. California Trust Co.* (1936) 15 Cal. App. 2d 612, 619, 59 P.2d 1035] .

[2] FORM**Termination on Payment**

_____ **[paragraph number] . Termination.** This contract may be terminated
_____ *[specify time limit, if any, e.g., at any time during the first year]* by either party on the payment
of \$ _____ to the other party as compensation for relinquishing that party's rights under this contract.

Legal Topics:

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

Contracts Law Contract Conditions & Provisions General Overview Contracts Law Performance Discharges &
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27-75 California Legal Forms--Transaction Guide §§ 75.244-75.249

[Reserved]

§§ 75.244[Reserved]



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4. Enforcement and Remedies

27-75 California Legal Forms--Transaction Guide § 75.250

§ 75.250 Arbitration

[1] Comment

[a] Use of Form

The *forms* in § 75.250[2]-[4], are three alternative arbitration provisions to be used when the parties want to provide in advance for arbitration of disputes. What scheme of arbitration the contract prescribes will depend on the circumstances and the goals of the parties. Among the choices available are the California Arbitration Act [*Code Civ. Proc. § 1280 et seq.*], the rules of the American Arbitration Association, and an original arbitration plan tailored specifically for the transaction at hand. Of the alternatives offered in this form, the first (short form) [*see § 75.250[2]*] and second (longer alternative) [*see § 75.250[3]*] will be governed principally by the rules set forth in the California Arbitration Act [*Code Civ. Proc. § 1280 et seq.*], while the third incorporates by reference the rules of the American Arbitration Association [*see § 75.250[4]*].

At the beginning of each of the alternative clauses is an optional phrase: "Notwithstanding every other provision of this contract... ." This phrase may be included when the contract also contains a service-of-suit clause [*see § 75.254*], in order to minimize the risk that a court might find a conflict between the arbitration clause and the service-of-suit clause [*see § 75.250[1][g]*].

Although arbitration is favored in law [*see California Forms of Pleading and Practice, Ch. 32, Contractual Arbitration: Agreements and Compelling Arbitration, § 32.11[2]*], an arbitration clause should be drafted with appropriate care to state the parties' intention as to what issues will be subject to arbitration. A court of appeal has warned that the strong policy in favor of arbitration may not be used to permit a party to enforce provisions of an arbitration agreement that either do not exist or were so poorly drafted that another party cannot be presumed to have agreed to them [*Thompson v. Toll Dublin, LLC* (2008) 165 Cal. App. 4th 1360, 1370, 81 Cal. Rptr. 3d 736 (arbitration provisions in agreement between plaintiff and defendant did not preclude this action)]. An attorney drafting an arbitration clause should bear in mind that when it comes to a court's attention, the clause will be given effect only to the extent that it *clearly and unmistakably* provides which issues the parties have agreed to submit to arbitration [*see*

generally *Gilbert Street Developers, LLC v. La Quinta Homes, LLC* (2009) 174 Cal. App. 4th 1185, 1190-1192, 94 Cal. Rptr. 3d 918 (California law is settled that parties to arbitration contract must "clearly and unmistakably agree" on what is subject to arbitration, and court will decide extent to which parties did that)]. An arbitration clause can effectively provide that the arbitrators will decide which issues the parties have agreed to submit to arbitration; however, a court has the final decision on whether the clause *clearly and unmistakably* provides that the arbitrators will have that power [e.g., *Gilbert Street Developers, LLC v. La Quinta Homes, LLC* (2009) 174 Cal. App. 4th 1185, 1192-1194, 94 Cal. Rptr. 3d 918 (clause that merely incorporates American Arbitration Association rules, without being specific about what issues are subject to arbitration, could fail to pass "clearly and unmistakably" test)].

[b] Arbitration Defined

Arbitration is the submission for determination of a disputed matter to private unofficial persons selected in the manner provided by law or by the agreement of the parties [*Stockwell v. Equitable F. & M. Ins. Co.* (1933) 134 Cal. App. 534, 540, 25 P.2d 873 ; see *Tipton v. Systron Donner Corp.* (1979) 99 Cal. App. 3d 501, 505, 160 Cal. Rptr. 303] . Arbitration resembles litigation when (as in the usual case) it consists of a hearing before a tribunal that has the power to render a binding decision, and the parties are represented by counsel, who may present evidence and examine and cross-examine witnesses. Such an arbitration differs from litigation in that the proceedings are usually informal [see, e.g., *Coast Plaza Doctors Hospital v. Blue Cross of California* (2000) 83 Cal. App. 4th 677, 689-690, 99 Cal. Rptr. 2d 809 (rejecting assertion that because opportunities for formal discovery are limited under American Arbitration Association's rules, arbitration agreement was "one-sided" and so unfair as to shock conscience under unconscionability theory)], the rules of evidence are more flexible, and the trier of fact is an expert selected by the parties.

Although a provision in a contract requiring arbitration is considered as creating a condition precedent to maintaining a legal action, it is subject to waiver. Whether the provision was waived is a question of fact [see, e.g., *Berman v. Health Net* (2000) 80 Cal. App. 4th 1359, 1361, 96 Cal. Rptr. 2d 295 (insurer waived right to compel arbitration by engaging in substantial discovery)].

[c] Choice of Arbitration Mechanisms

The choice of arbitration is a matter of contract [*Tipton v. Systron Donner Corp.* (1979) 99 Cal. App. 3d 501, 505, 160 Cal. Rptr. 303] , and the parties are free to shape the plan they want [*Morris v. Zukerman* (1967) 257 Cal. App. 2d 91, 96, 64 Cal. Rptr. 714] , bearing in mind that unusual provisions should be very carefully drafted [see, e.g., *Segal v. Silberstein* (2007) 156 Cal. App. 4th 627, 635 n.10, 67 Cal. Rptr. 3d 426 ("At bottom, this is a poorly worded arbitration provision and ... it concerns us that such a troubling provision has found its way into use in California.")]

Two common choices are the rules of the American Arbitration Association [see, e.g., *Larkin v. Williams, Woolley, Cogswell, Nakazawa & Russell* (1999) 76 Cal. App. 4th 227, 230-231, 90 Cal. Rptr. 2d 195 (reversing order denying petition to compel arbitration)] and the provisions of the California Arbitration Act. Whether the parties should provide that their contract is subject to arbitration under the specific and comprehensive rules of the American Arbitration Association [see § 75.250[1][d]] or under the more general and flexible structure of the California Arbitration Act [Code Civ. Proc. § 1280 et seq.; see § 75.250[1][e]] depends on the goals and needs of the parties. The parties may, of course, draft their own rules in whatever detail is appropriate.

Care should be taken to avoid specifying an arbitration mechanism that could be held to be procedurally or substantively unconscionable. An example of a substantively unconscionable arbitration mechanism was found in an investment company's standard-form customer account agreement that required customers to arbitrate disputes before a panel of three arbitrators from the Judicial Arbitration and Mediation Service and prohibited consolidation or joinder of claims. This was held to be so prohibitively expensive as to be unconscionable. The investment company's failure in court to offer a justification or explanation for requiring three arbitrators instead of one demonstrated that these provisions were included deliberately for the improper purpose of discouraging or preventing customers from

vindicating their rights. Because these provisions could not be severed, the arbitration provisions in their entirety were unenforceable [*Parada v. Superior Court (Monex Deposit Co.)* (2009) 176 Cal. App. 4th 1554, 1586-1587, 98 Cal. Rptr. 3d 743] .

[d] Rules of American Arbitration Association

A simplified provision is the model arbitration clause of the American Arbitration Association [see § 75.250[4]], which incorporates by reference the association's comprehensive arbitration rules. (The association maintains offices in Irvine, Los Angeles, San Diego, and San Francisco.) This reference allows the drafter to incorporate into the provision, using a minimum of words, the answers to many complex questions. The detail is in the rules themselves, which tell what is to be arbitrated, how, where, and when it is to be arbitrated, and who is to administer the arbitration. However, the clause covers any controversy or claim arising out of the contract or the breach of the contract. It could be modified, for example, by setting a dollar amount as a minimum qualification for arbitration.

In requesting rules and information from the association, it is important to specify the type of agreement involved. The association publishes various sets of arbitration rules applicable to specific types of disputes as well as various guides, forms, and other materials. These are available on the association's web site at <http://www.adr.org/>.

[e] California Arbitration Act

The California Arbitration Act [*Code Civ. Proc. § 1280 et seq.*] provides for the enforcement of arbitration agreements, the conduct of arbitration proceedings, and the enforcement of arbitration awards, including special judicial proceedings related to arbitration agreements. Many of the statutory provisions on the enforcement of the arbitration agreement and the conduct of the arbitration proceedings apply only if the arbitration agreement or the parties do not otherwise provide [see, e.g., *Code Civ. Proc. §§ 1281.3, 1281.6, 1282, 1282.2, 1283.8, 1284.2* (consolidation of arbitration proceedings; appointment of arbitrators; exercise of powers by arbitrators; conduct of hearings; time for award; expenses of arbitration)]. Thus, the statute applies at least in part to almost all arbitration agreements, including the provisions in § 75.250[2] and [3] the extent to which it applies depends on the comprehensiveness of the agreement itself. The California Arbitration Act therefore is more flexible than the American Arbitration Association rules.

One of the requirements for enforcement of an arbitration agreement is that it must not be substantively unconscionable, that is, it must not be unfairly one-sided in imposing arbitration on one party while leaving the other party free to avoid arbitration, unless there is "at least some reasonable justification for such one-sidedness based on business realities" [*Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal. 4th 83, 117-118, 99 Cal. Rptr. 2d 745, 6 P.3d 669] . In other words, generally, the arbitration agreement must satisfy a requirement of mutuality. This will be sufficient to save the agreement from being unconscionable even if it amounts to a contract of adhesion because it was imposed on the weaker party by the party in the stronger bargaining position. Usually the requirement of mutuality is met by ensuring that the arbitration agreement binds both parties equally, so that one party does not have greater rights or protections, on account of the arbitration agreement, than the other party has [e.g., *Jones v. Humanscale Corp.* (2005) 130 Cal. App. 4th 401, 415-416, 29 Cal. Rptr. 3d 881 (agreement met mutuality requirement in providing that "any dispute involving the performance, interpretation... [or] breach of this agreement or the relationship created hereby, including without limitation, disputes involving... laws against discrimination and other rights and protections afforded by... law")].

An arbitration clause may be enforceable even if part of the contract in which it appears is illegal. If the illegality goes to only a portion of the contract that does not include the arbitration agreement, the entire controversy, including the issue of illegality, remains arbitrable [see *Moncharsh v. Heily & Blase* (1992) 3 Cal. 4th 1, 29-30, 10 Cal. Rptr. 2d 183, 832 P.2d 899 (fee-splitting agreement between attorneys); see also *Wolitsky v. Blue Cross of California* (1997) 53 Cal. App. 4th 338, 61 Cal. Rptr. 2d 629 (health insurance policy provision)]. However, when statutorily required language is omitted from the contract, and the requirement is "central to the policy of the statutes," an arbitration

provision in the contract is unenforceable under California law if the statutory scheme expressly provides that contracts omitting the required language are void and unenforceable [*Duffens v. Valenti* (2008) 161 Cal. App. 4th 434, 456, 74 Cal. Rptr. 3d 311 (dating-services contract, governed by Civ. Code § 1694 et seq.)]. (This would not be true if the Federal Arbitration Act applied in lieu of California law [*Duffens v. Valenti* (2008) 161 Cal. App. 4th 434, 451, 74 Cal. Rptr. 3d 311] .)

[f] International Commercial Disputes

Arbitration or conciliation agreements made between international commercial parties [see Code Civ. Proc. §§ 1297.13, 1297.16 (when arbitration or conciliation agreement is international and when it is commercial)] are governed by specific statutory provisions [see Code Civ. Proc. § 1297.11 et seq.]. These provisions supersede the provisions of the California Arbitration Act with respect to international commercial arbitration and conciliation [Code Civ. Proc. § 1297.17; see Code Civ. Proc. § 1280 et seq.]. Other laws in force in California restricting the arbitration or conciliation of certain disputes are unaffected [Code Civ. Proc. § 1297.17].

The statutory arbitration scheme is similar to that for domestic arbitrations and covers composition and jurisdiction of arbitration panels [Code Civ. Proc. § 1297.101 et seq.], manner and conduct of arbitrations [Code Civ. Proc. § 1297.181 et seq.], arbitration awards, and termination of arbitration proceedings [Code Civ. Proc. § 1297.281 et seq.]. Most of these provisions will govern when the parties have not expressly covered these matters [see, e.g., Code Civ. Proc. § 1297.101].

Parties to an international commercial agreement that qualifies for arbitration or conciliation may agree to resolve disputes arising from that agreement by conciliation [Code Civ. Proc. § 1297.341]. Conciliators are selected to assist the parties in an independent and impartial manner in their attempt to reach an amicable settlement of their dispute [Code Civ. Proc. § 1297.341]. Submission of a dispute to conciliation will stay all judicial or arbitral proceedings until the termination of conciliation proceedings [Code Civ. Proc. § 1297.381]. Statutory rules govern, among other things, termination, enforceability of a conciliation decree, and costs relating to the conciliation [see Code Civ. Proc. §§ 1297.391 et seq., 1297.401, 1297.411, 1297.412]. The alternative in [2], § 75.250[2] may be adapted for use when the parties wish to add a conciliation clause to their international commercial agreement.

[g] Effect of Service-of-Suit Clause in Contract

Generally, because of the public policy favoring arbitration in lieu of litigation, courts have tended to hold that a service-of-suit clause [see § 75.254] can co-exist in a contract along with an arbitration clause--that is, the two clauses will not be in conflict--as long as the service-of-suit clause can be interpreted as having been intended to facilitate enforcement of the arbitration clause. This is easily possible if the arbitration clause is qualified by an introductory phrase such as "Notwithstanding every other provision of this contract ... " [*Boghos v. Certain Underwriters at Lloyd's of London* (2005) 36 Cal. 4th 495, 502-503, 30 Cal. Rptr. 3d 787, 115 P.3d 68 (both clauses could operate in insurance contract when it was construed so that service-of-suit clause would allow insured to sue in court if insurer refused to arbitrate or refused to pay award)].

[h] Class Action Waiver in Consumer Contract

In some cases in California, class action waivers in consumer contracts of adhesion are unenforceable, whether the consumer is being asked to waive the right to class-action litigation or the right to class-wide arbitration. When the waiver is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money, then, at least to the extent that the obligation at issue is governed by California law, the waiver becomes in practice what is prohibited by statute: the exemption of the stronger party from responsibility for its own fraud, or willful injury to the

person or property of another [see *Civ. Code* § 1668]. Under these circumstances, such waivers are unconscionable under California law and should not be enforced [*Discover Bank v. Superior Court* (2005) 36 Cal. 4th 148, 162-163, 30 Cal. Rptr. 3d 76, 113 P.3d 1100 ; *Aral v. Earthlink, Inc.* (2005) 134 Cal. App. 4th 544, 557, 36 Cal. Rptr. 3d 229 (waiver of class-wide arbitration in contract for consumer DSL internet service); *Szetela v. Discover Bank* (2002) 97 Cal. App. 4th 1094, 1099-1102, 118 Cal. Rptr. 2d 862] .

Moreover, the Federal Arbitration Act [9 U.S.C. § 1 *et seq.*; see Ch. 32, *Contractual Arbitration: Agreements and Compelling Arbitration*] does not preempt California law in this respect [*Discover Bank v. Superior Court* (2005) 36 Cal. 4th 148, 153, 30 Cal. Rptr. 3d 76, 113 P.3d 1100] .

Prior to the *Discover Bank* decision, the Ninth Circuit had held that a telecommunications carrier's new consumer services agreement was both procedurally and substantively unconscionable under California law. The imposition of the contract on customers without the opportunity for negotiation, modification, or waiver rendered it procedurally unconscionable. The one-sided contract terms, which barred class actions, imposed an arbitration fee scheme, and required any arbitration to remain confidential, rendered the contract substantively unconscionable [*Ting v. AT&T* (9th Cir. 2003) 319 F.3d 1126, 1148-1152] .

If the contract contains an enforceable choice-of-law provision selecting the law of a different state as governing the contract, however, then the validity of the class action waiver must be determined under the law of that state; and the waiver could, therefore, be enforceable in a California court [*Discover Bank v. Superior Court* (2005) 134 Cal. App. 4th 886, 889, 36 Cal. Rptr. 3d 456] .

[i] Time Limit to Demand Arbitration

A party waives the right to compel arbitration by failing to comply with a time limit for demanding arbitration specified in the contract. When no time limit for demanding arbitration is specified, a party must still demand arbitration within a reasonable time [*Wagner Constr. Co. v. Pacific Mechanical Corp.* (2007) 41 Cal. 4th 19, 30, 58 Cal. Rptr. 3d 434, 157 P.3d 1029] .

[j] Whether to Use "Broad" or "Narrow" Provision

A court's decision on whether a contractual arbitration provision covers a particular dispute (and therefore would support an order compelling arbitration) rests substantially on whether the provision in question is "broad" or "narrow." A broad provision is one using language such as "any claim arising from or related to this agreement." A provision that is more specific about which disputes are subject to arbitration could lead a court to deny a petition for an order compelling arbitration, on the ground that the dispute in question cannot be characterized as being of the kind that the arbitration provision was intended to cover [see generally *Bono v. David* (2007) 147 Cal. App. 4th 1055, 1067-1068, 54 Cal. Rptr. 3d 837 (claim for damages for defamation was not subject to compelled arbitration under provision in land-development agreement between plaintiff and defendant, which required arbitration of controversies involving "the construction and application of any provision of this Agreement"; other examples of narrow provisions from cases are cited)].

[k] Attempting to Control Judicial Review of Award

Contractual limitations may alter the usual scope of judicial review of an arbitration award [see generally CALIFORNIA FORMS OF PLEADING AND PRACTICE, Ch. 34, *Contractual Arbitration: Judicial Review* (Matthew Bender)]. The California rule is that the parties may obtain judicial review of the merits by express agreement. For example, the parties might agree that the arbitrators "shall not have the power to commit errors of law or legal reasoning, and the award may be vacated or corrected on appeal to a court of competent jurisdiction for any such error"; and such a provision would be enforceable under California law, even though statutory grounds for correction

and vacation of arbitration awards do not ordinarily include errors of law [*Cable Connection, Inc. v. DIRECTV, Inc.* (2008) 44 Cal. 4th 1334, 82 Cal. Rptr. 3d 229, 190 P.3d 586 ; see *Code Civ. Proc.* §§ 1286.2(a)(4), 1286.6(b) (one ground for review of arbitration award is that arbitrators exceeded their powers)].

The Federal Arbitration Act [9 U.S.C. § 1 *et seq.*] does not permit the parties to expand the scope of judicial review by agreement; however, federal law does not preclude an expansion of judicial review based on authority outside that statute, including state statutory and common law [*Hall St. Assocs., L.L.C. v. Mattel, Inc.* (2008) 128 S. Ct. 1396, 1404-1405, 1406, 170 L. Ed. 2d 254] . In the California Arbitration Act [*Code Civ. Proc.* § 1280 *et seq.*], the legislature adopted the position, taken in case law, that in the absence of some limiting clause in the arbitration agreement, the merits of an award may not be reviewed, either on questions of fact or on questions of law, except as provided in the statute [*Moncharsh v. Heily & Blase* (1992) 3 Cal. 4th 1, 25, 10 Cal. Rptr. 2d 183, 832 P.2d 899] . Therefore, in order to avoid the general rule that the merits of the award are not subject to judicial review, the parties must agree, explicitly and unambiguously [see § 75.250[1][I]], that legal errors would exceed the arbitrators' authority and for that reason would be reviewable by the courts [*Cable Connection, Inc. v. DIRECTV, Inc.* (2008) 44 Cal. 4th 1334, 82 Cal. Rptr. 3d 229, 190 P.3d 586] .

Because the Federal Arbitration Act does not permit the parties to expand the scope of judicial review by agreement, it follows that when the parties intend to agree that legal errors would exceed the arbitrators' authority and for that reason would be reviewable by the courts, their agreement should not include any statement to the effect of "Interpretation of this agreement to arbitrate shall be governed by the Federal Arbitration Act." If such a statement were inserted into the agreement, and if a court were to find a flaw in the parties' attempt to expressly agree that legal errors would be reviewable, then the presence of that statement in the agreement would reinforce the court's conclusion that the parties failed to meet the requirement for making legal errors reviewable [e.g., *Christensen v. Smith* (2009) 171 Cal. App. 4th 931, 937-938, 90 Cal. Rptr. 3d 57] .

[I] Limitation of Arbitrator's Powers

If the parties intend to limit the arbitrator's generally broad powers, the arbitration agreement must explicitly and unambiguously state that intention [*Advanced Micro Devices, Inc. v. Intel Corp.* (1994) 9 Cal. 4th 362, 383, 36 Cal. Rptr. 2d 581, 885 P.2d 994] . An ambiguous provision normally will be construed as not having the intended limiting effect. For example, if the limiting provision forbids the arbitrator to "modify or change" any material term of the parties' contract, that is an explicit limitation (made more explicit if the contract specifies that certain terms are material terms for this purpose); however, such a provision does not unambiguously prohibit the arbitrator from excusing one party's nonperformance of a contractual condition if the arbitrator finds that the party's performance would have been an idle act. In a case involving such a provision, the California Supreme Court concluded that, while the provision would have been effective to bar an actual change or modification, excusing nonperformance of a contractually imposed condition in a specific factual setting is not, in ordinary usage at least, to "modify or change" a term of the contract. The no-modification provision in that case did not explicitly *and unambiguously* bar the arbitrator from deciding that a contractual condition--a requirement to give notice of a breach and an opportunity to cure it--was simply inapplicable in view of the facts of the case [*Gueyffier v. Ann Summers, Ltd.* (2008) 43 Cal. 4th 1179, 1185, 77 Cal. Rptr. 3d 613, 184 P.3d 739 (arbitrator, moreover, being empowered generally to construe parties' contract, could decide to interpret that no-modification provision otherwise, and courts would be obliged to accept that interpretation)].

[m] Requirement for Prominent Provision

In some situations a statute or regulation might require that a provision for arbitration must be prominent; for example, a statute governing enrollment in a health-care-services plan requires that an arbitration provision "shall be prominently displayed on the enrollment form signed by each subscriber or enrollee" [*Health & Safety Code* § 1363.1(b)]. Unless the statute or regulation specifies how to meet such a requirement, it means that the arbitration provision must "stand out" from the ordinary text of the agreement so as to "be reasonably expected to command the notice of a person" [e.g.,

Burks v. Kaiser Found. Health Plan, Inc. (2008) 160 Cal. App. 4th 1021, 1024, 73 Cal. Rptr. 3d 257 (arbitration provision did not meet requirement of *Health & Safety Code § 1363.1(b)* because it was printed in same or smaller typeface as was used in rest of enrollment form, and arbitration provision was neither highlighted, italicized, nor bold-faced, nor did it have separate heading)). If the statute or regulation specifies where the arbitration provision must be placed (such as immediately before a signature line) along with requiring that it be prominent, then both requirements must be met; satisfying the placement requirement would not amount to satisfying the prominence requirement [*Burks v. Kaiser Found. Health Plan, Inc. (2008) 160 Cal. App. 4th 1021, 1027-1028, 73 Cal. Rptr. 3d 257*] .

[2] FORM--General Arbitration Provision

General Arbitration Provision

_____ [paragraph number]. **Arbitration.** [Notwithstanding every other provision of this contract,] [Any controversy between the parties regarding the construction or application of this contract, and any claim arising out of this contract or its breach, shall be submitted to arbitration on the written request of one party after the service of that request on the other party. _____ [add, if desired: The parties shall each appoint one person to hear and determine the dispute. If these two arbitrators cannot agree, then the two arbitrators shall choose a third impartial arbitrator whose decision shall be final and conclusive on both parties. The cost of the arbitration shall be borne by the losing party or in such proportions as the arbitrators shall decide.]

[3] FORM--Provision Specifying Arbitration Procedure

Provision Specifying Arbitration Procedure

_____ [paragraph number]. **Arbitration.** [Notwithstanding every other provision of this contract,] [A]ll questions and disputes with respect to rights and obligations of the parties arising under this contract _____ [add, if desired: except _____ (specify exception)] shall be resolved by arbitration.

(a) **Demand for Arbitration.** A party may demand arbitration by delivering a written demand to the other party within _____ [specify time, e.g., 60 days] after occurrence of the dispute.

(b) **Appointment of Arbitrators.** The parties may agree on one arbitrator. If they cannot agree on one arbitrator, there shall be three: one named in writing by each of the parties within five days after demand for arbitration is given, and a third chosen by the two appointed. Should either party refuse or neglect to join in the appointment of the arbitrator(s) or to furnish the arbitrator(s) with any papers or information demanded, the arbitrator(s) may proceed ex parte.

(c) **Hearing.** A hearing on the matter to be arbitrated shall take place before the arbitrator(s) in _____ [city and/or county], California, the time and place to be selected by the arbitrator(s). The arbitrator(s) shall give each party written notice of the time and place at least _____ days before the date selected. At the hearing, any relevant evidence may be presented by either party, and the formal rules of evidence applicable to judicial proceedings shall not govern. Evidence may be admitted or excluded in the sole discretion of the arbitrator(s). The arbitrator(s) shall hear and determine the matter and shall execute and acknowledge the award in writing and cause a copy of the writing to be delivered to each of the parties.

(d) **Award.** If there is only one arbitrator, his or her decision shall be binding and conclusive on the parties, and if there are three arbitrators, the decision of any two shall be binding and conclusive. The submission of a dispute to the arbitrator(s) and the rendering of a decision by the arbitrator(s) shall be a condition precedent to any right of legal action on the dispute. A judgment confirming the award may be given by any superior court having jurisdiction, or that court may vacate, modify, or correct the award in accordance with the prevailing provision of the California Arbitration Act.

(e) **New Arbitrators.** If three arbitrators are selected, but no two of the three are able to reach a consensus regarding the determination of the dispute, then the matter shall be decided by three new arbitrators who shall be appointed and shall proceed in the same manner, and the process shall be repeated until a decision is agreed on by two of the three arbitrators selected.

(f) **Costs of Arbitration.** The costs of the arbitration shall be borne by the losing party or shall be borne in such proportions as the arbitrator(s) may determine.

[4] FORM--Provision Adopting American Arbitration Association Procedure

Provision Adopting American Arbitration Association Procedure

_____ [paragraph number]. **Arbitration.** [Notwithstanding every other provision of this contract,] [A]ny controversy or claim arising out of this contract, or the breach thereof, _____ [add, if desired: except _____ (list any exceptions, e.g., controversies involving less than \$5,000),] shall be settled by arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association, and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction.

Legal Topics:

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

Contracts LawContract Conditions & ProvisionsGeneral OverviewContracts LawContract Conditions & ProvisionsArbitration Clauses



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27-75 California Legal Forms--Transaction Guide § 75.251

§ 75.251 Liquidated Damages

[1] Comment

[a] Use of Form

The *form in § 75.251[2], below*, is a liquidated damages provision. The form includes two alternatives. One is for contracts subject to the general rule governing liquidated damages [*see § 75.251[1][b], below*]; the other is for residential real property leases and consumer contracts subject to the special rule of *Civ. Code § 1671(c) and (d)* [*see § 75.251[1][c], below*].

For liquidated damages provisions for use in the sale of real property, see Ch. 23, *Real Property Sales Agreements*. For liquidated damages provisions for use in employment contracts, see Ch. 85, *Employment Agreements*.

[b] Liquidated Damages

A liquidated damages provision in a contract is valid unless the party seeking to invalidate the provision can establish that the provision was unreasonable under the circumstances existing at the time it was made [*Civ. Code § 1671(b)*]; *Ridgley v. Topa Thrift & Loan Assn. (1998) 17 Cal. 4th 970, 979-981, 73 Cal. Rptr. 2d 378, 953 P.2d 484* (promissory note clause that imposed charge of six months interest if borrowers prepaid loan principal, and provided that charge would not be imposed six months after execution of note unless borrowers had made late interest payment or otherwise defaulted, was unenforceable penalty for late payment); *Weber, Lipshie & Co. v. Christian (1997) 52 Cal. App. 4th 645, 656-657, 60 Cal. Rptr. 2d 677* (partners' liquidated damages provision, that damages to accounting firm for loss of fees from breach of covenant would be measured by doubling firm's time charges for clients lost due to breach for 12 months immediately preceding their loss, was enforceable); *Hong v. Somerset Associates (1984) 161 Cal. App. 3d 111, 115, 207 Cal. Rptr. 597*. Under this rule, the amount of damages actually suffered has no bearing on the validity of the liquidated damages provision [*Hong v. Somerset Associates (1984) 161 Cal. App. 3d 111, 115, 207 Cal. Rptr. 597*], because the test of validity looks forward from the making of the contract [*see Better Foods Mkts. v. Amer. Dist. Teleg. Co. (1953) 40 Cal. 2d 179, 185, 253 P.2d 10* (construing former *Civ. Code §§ 1670 and 1671*)], not backward from the

actual breach.

Whether the liquidated damages provision was reasonable when made depends on the then-existing circumstances. The following factors may be particularly relevant:

- The relationship that the liquidated damages bear to the harm that could reasonably be anticipated.
- The equality of the bargaining power of the parties.
- Whether the parties were represented by counsel at the time the contract was made.
- The anticipation of the parties that proof of actual damages would be costly or inconvenient.
- The difficulty of proving causation and foreseeability.
- Whether the liquidated damages provision is included in a form contract.

When a liquidated damages provision is challenged in court, if *Civ. Code § 1671(b)* applies, the party seeking to invalidate the provision will have the burden of proof and will have to submit evidence proving (not merely permitting an inference) that the provision was unreasonable when the agreement was made [*e.g., El Centro Mall, LLC v. Payless ShoeSource, Inc. (2009) 174 Cal. App. 4th 58, 64-65, 94 Cal. Rptr. 3d 43* (shopping center tenant's evidence, while permitting inference that provision in lease was arbitrary, did not "conclusively prove the point")].

The general rule does not apply in any case in which another statute expressly applicable to the contract prescribes the rules or the standard for determining the validity of a liquidated damages provision [*Civ. Code § 1671(a)*]. Special rules governing defaults on real property purchase contracts are covered in *Civ. Code § 1675 et seq.* For coverage of these rules, see Ch. 23, *Real Property Sales Agreements*.

[c] Residential Real Property Leases and Consumer Contracts

A special rule is applied to liquidated damages provisions in residential real property leases and consumer contracts [*Civ. Code § 1671(c)*]. For such contracts, a liquidated damages provision is void, except that the parties may agree on an amount of presumed damages for breach if, from the nature of the case, it would be impracticable or extremely difficult to fix the actual damages [*Civ. Code § 1671(d)*]. This provision protects consumers and lessees of residential real property from liquidated damages provisions in contracts of adhesion. For this purpose, a consumer is a party to a contract for the retail purchase or rental, by the same party, of personal property or services primarily for the party's personal, family, or household purposes [*Civ. Code § 1671(c)(1)*].

Case law adds a requirement that the sum specified in a liquidated damages provision in a consumer contract or residential lease must reflect a reasonable endeavor by the parties to ascertain what the actual damages would be [*McCarthy v. Tally (1956) 46 Cal. 2d 577, 586, 297 P.2d 981* (applying former *Civ. Code § 1671*, now limited to consumer contracts and residential leases); see *Utility Consumers' Action Network, Inc. v. AT&T Broadband of S. Cal., Inc. (2006) 135 Cal. App. 4th 1023, 1029, 37 Cal. Rptr. 3d 827* (with respect to liquidated damages provision in consumer contract or residential lease, prior law under former *Civ. Code §§ 1670 and 1671* is continued in *Civ. Code § 1671(d)*, and decisions interpreting those former code sections still apply in such a case)]. This does not imply that there must always be bargaining between the parties, with the aim of settling on that sum. In the case of a standardized contract of adhesion offered to a very large number of consumers by a supplier of consumer services, for example (such as a contract for Internet services), such bargaining is not practical with respect to small sums such as a late payment charge to a consumer. If the supplier endeavors reasonably to ascertain what the actual damages would be, and the resulting amount specified in the contract is not unreasonable, then the requirement has been met, and the liquidated

damages provision is valid [*Utility Consumers' Action Network, Inc. v. AT&T Broadband of S. Cal., Inc. (2006) 135 Cal. App. 4th 1023, 1035-1038, 37 Cal. Rptr. 3d 827*] .

[2] FORM

Liquidated Damages

[EITHER]

_____ [paragraph number]. **Liquidated Damages.** The parties agree that, if _____ [name of party] breaches _____ [his or her or its] promise to _____ [specify] by _____ [specify nature of breach that will activate liquidated damages provision], then _____ [he or she or it] shall pay the sum of \$_____ to _____ [name of other party] as liquidated damages.

[OR]

_____ [paragraph number]. **Liquidated Damages.** If _____ [name of party] breaches _____ [his or her or its] promise to _____ [specify] by _____ [specify nature of breach that will activate liquidated damages provision], then determining the resulting damages would be impracticable or extremely difficult, because _____ [specify reason]. Therefore, the parties agree that, in the event of such a breach, [name of party] shall pay the sum of \$_____ to _____ [name of other party] as liquidated damages.

Legal Topics:

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

Contracts LawContract Conditions & ProvisionsGeneral OverviewContracts LawRemediesLiquidated Damages



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27-75 California Legal Forms--Transaction Guide § 75.252

§ 75.252 Recovery of Attorneys' Fees

[1] Comment

[a] Use of Form

The *forms in § 75.252[2]* illustrate two ways to provide that the prevailing party in litigation arising under the contract will be entitled to recover reasonable attorneys' fees. A litigant is not entitled to attorneys' fees unless they are agreed to by the parties or specifically provided for by statute [*Code Civ. Proc. § 1021*; *Reid v. Valley Restaurants, Inc. (1957) 48 Cal. 2d 606, 610, 311 P.2d 473*; *Olson v. Arnett (1980) 113 Cal. App. 3d 59, 67, 169 Cal. Rptr. 629*].

In a contract that provides for arbitration, two provisions might be used, one of which allows attorney's fees in an arbitration proceeding, while the other allows attorney's fees in court proceedings. When that is the case, and court proceedings occur regarding whether the arbitration provision should be enforced, the court may award attorney's fees to the prevailing party, notwithstanding the possibility that, if the arbitration provision is enforced, that party might not prevail in the ensuing arbitration [*Turner v. Schultz (2009) 175 Cal. App. 4th 974, 980-984, 96 Cal. Rptr. 3d 659* (action for declaratory and injunctive relief to avoid enforcement of contract's arbitration provision absent order compelling arbitration was "action on a contract" for purposes of awarding attorney's fees pursuant to *Civ. Code § 1717*; defendant was entitled to attorney's fees for successful defense in this action, notwithstanding possibility that defendant might not prevail in ensuing arbitration, and this conclusion was reinforced by fact that contract had two provisions, one for fees in court proceedings to enforce contract, other for fees in arbitration proceeding)].

[b] Prevailing Party

In any action on a contract, if the contract provides that attorneys' fees and costs incurred to enforce the contract are to be awarded either to one of the parties or to the prevailing party, then the party prevailing in an action on the contract, regardless of whether he or she is the party named in the contract, is entitled to reasonable attorneys' fees in addition to other costs [*Civ. Code § 1717(a)*; see *Scott Co. v. Blount, Inc. (1999) 20 Cal. 4th 1103, 1108-1109, 86 Cal. Rptr. 2d 614, 979 P.2d 974* (although attorneys' fees provision was unilateral, giving only defendant and not plaintiff right to

attorney fees, *Civ. Code § 1717* rendered provision mutual, giving prevailing plaintiff right to attorneys' fees on claims based on contract); *see also Gilbert v. Master Washer & Stamping Co. (2001) 87 Cal. App. 4th 212, 214, 104 Cal. Rptr. 2d 461* (attorney represented by other members of his or her law firm is entitled to recover reasonable attorneys' fees under *Civ. Code § 1717* when representation involves attorneys' personal interests and not those of the firm); *International Billing Services, Inc. v. Emigh (2000) 84 Cal. App. 4th 1175, 1182-1183, 101 Cal. Rptr. 2d 532* (employees were entitled to attorneys' fees under *Civ. Code § 1717(a)* in accordance with employment contract providing: "You promise to reimburse Company for any legal fees, liability, or loss which Company incurs as a result of any unauthorized disclosure or use of Confidential Information by You.").

The court, on notice and motion by a party, determines who is the prevailing party, whether or not the suit proceeds to final judgment [*see, e.g., Sears v. Baccaglio (1998) 60 Cal. App. 4th 1136, 1154-1155, 70 Cal. Rptr. 2d 769* (party can fail to recover net monetary judgment and still prevail for purposes of collecting fees in action founded on contract)]. A court may deny a contractual claim for attorneys' fees by a defendant who has been voluntarily dismissed from a suit prior to trial [*see Santisas v. Goodin (1998) 17 Cal. 4th 599, 602, 608, 71 Cal. Rptr. 2d 830* (examining recovery of attorneys' fees incurred defending action when plaintiff has voluntarily dismissed action before trial)]; *see also Topanga and Victory Partners, LLP v. Toghia (2002) 103 Cal. App. 4th 775, 778, 127 Cal. Rptr. 2d 104* (defendant who was not party to contract but was sued for breach of contract and other causes of action may not recover attorney fees incurred in defending noncontract causes of action when plaintiff has filed voluntary dismissal with prejudice); *Silver v. Boatwright Home Inspection, Inc. (2002) 97 Cal. App. 4th 443, 446, 118 Cal. Rptr. 2d 475* (holding that defendant was not prevailing party when plaintiffs obtained their litigation objective through settlement with other defendants)]. Generally, the party prevailing on the contract is the party who obtained the greater relief in the action on the contract.

This form does not include a definition of "prevailing party"; however, a provision for recovery of attorneys' fees could include a definition, such as: "The prevailing party shall be the party entitled to recover its costs of suit, regardless of whether such suit proceeds to final judgment." A court of appeal holds that the word "suit" in such a definition would refer to the entire action, not to a single proceeding within the lawsuit; therefore, the prevailing party would be determined by looking at the action as a whole, not by viewing the trial proceedings and any appellate proceedings in isolation [*Butler-Rupp v. Lourdeaux (2007) 154 Cal. App. 4th 918, 929, 65 Cal. Rptr. 3d 242*].

The court may also determine that there is no prevailing party for the purpose of awarding attorneys' fees [*Civ. Code § 1717(b)(1)*]. If an action has been voluntarily dismissed or dismissed pursuant to a settlement, there is no prevailing party. If the answer alleges that the defendant tendered to the plaintiff the full amount to which the plaintiff was entitled, and the defendant deposits that amount in court for the plaintiff, then the defendant is a prevailing party if the allegation is found to be true. If such a deposit has been made, any party to the action may apply to the court for an order that the deposit be invested in an insured, interest-bearing account, and the court must issue the order. The interest on the deposit must be allocated to the parties in the same proportion as the original funds are allocated [*Civ. Code § 1717(b)(2)*].

[c] Application to Entire Contract

If a contract provides for attorneys' fees, the provision will be interpreted to apply to the entire contract, unless each party was represented by counsel in the negotiation and execution of the contract. The representation of each party must be specified in the contract [*Civ. Code § 1717(a)*]. The forms in § 75.252[2] illustrate alternative ways to spell out the scope of application of the fee provision.

[d] Deduction of Fees From Noncontract Damages

If the prevailing party is adjudged liable for noncontract damages in the same action, the amounts awarded for costs and fees to the prevailing party will be deducted from the noncontract damages awarded to the other party. If the amount awarded for attorneys' fees and costs exceeds the amount of the noncontract damages awarded to the other party, then

the net amount will be awarded to the prevailing party, and judgment may be entered in favor of the prevailing party for that net amount [Civ. Code § 1717(c)].

[e] Enforcement

A contract clause providing for attorneys' fees is a type of indemnity agreement [*Citizens Suburban Co. v. Rosemont Dev. Co.* (1966) 244 Cal. App. 2d 666, 683, 53 Cal. Rptr. 551], and the fees may be recovered in the action on the contract or in a subsequent action, unless the contract requires otherwise [*Genis v. Krasne* (1956) 47 Cal. 2d 241, 247-249, 302 P.2d 289]. The fees must be due in an "action on [the] contract" [Civ. Code § 1717(a)]. Actions on the contract include actions for breach of the contract [*Heidt v. Miller Heating & Air Conditioning Co.* (1969) 271 Cal. App. 2d 135, 137, 74 Cal. Rptr. 695] and actions to rescind the contract for fraud [*Star Pacific Investments, Inc. v. Oro Hills Ranch, Inc.* (1981) 121 Cal. App. 3d 447, 460-461, 176 Cal. Rptr. 546].

If the plaintiff seeks redress for fraud by bringing a tort action for damages, attorneys' fees are not available, because a tort action is not an action on a contract to enforce the contract [*Stout v. Turney* (1978) 22 Cal. 3d 718, 730, 150 Cal. Rptr. 637, 586 P.2d 1228; see Civ. Code § 1717]. However, if the attorneys' fees clause is inadvertently worded broadly, attorneys' fees may be awarded in a tort action under Code Civ. Proc. § 1021, which allows parties to provide for attorneys' fees in any type of action, not merely contract actions [*Xuereb v. Marcus & Millichap, Inc.* (1992) 3 Cal. App. 4th 1338, 1341-1344, 5 Cal. Rptr. 2d 154 (phrase "gives rise to" includes both tort and contract actions flowing from contract)]. To avoid this possibility, the form in § 75.252[2] is worded to provide for an award of attorney's fees only in a contract action, not a tort action.

[f] Conditions Precedent

When a contract provides that in any action between the parties, the prevailing party is entitled to recover attorneys' fees unless that party brought the action without first attempting to mediate the dispute, or refused to mediate after a request was made, then seeking or participating in mediation is a condition precedent to the recovery of attorneys' fees by that party [*Johnson v. Siegel* (2000) 84 Cal. App. 4th 1087, 1100, 101 Cal. Rptr. 2d 412]. If the other party prevails, however, the other party may recover attorneys' fees pursuant to Civ. Code § 1717, whether or not mediation was sought by either party [*Van Slyke v. Gibson* (2007) 146 Cal. App. 4th 1296, 1299-1300, 53 Cal. Rptr. 3d 491].

[2] FORM

Recovery of Attorney's Fees

[EITHER]

____ [paragraph number]. **Attorneys' Fees.** If any party to this contract resorts to a contract action _____ [add, if appropriate: or arbitration] to enforce or interpret any provision of this contract, the prevailing party shall be entitled to recover reasonable attorneys' fees in addition to any other relief to which that party may be entitled. This provision applies _____ [to the entire contract or only to actions to enforce _____ (describe portions of contract covered by provision, e.g., Paragraph 7) of this contract; and each party to this contract was represented by an attorney in the negotiation and execution of the agreement].

[OR]

____ [paragraph number]. **Attorneys' Fees.** If any _____ [legal action or specify more limited provision, e.g., legal action based in contract law], including _____ [add, if appropriate: arbitration or] an action for declaratory relief, is brought to enforce or interpret the provisions of this contract, the prevailing party

shall be entitled to recover reasonable attorneys' fees from the other party. These fees, which may be set by the court in the same action or in a separate action brought for that purpose, are in addition to any other relief to which the prevailing party may be entitled. This provision applies _____[to the entire contract *or* only to actions to enforce _____ (*describe portions of contract covered by provision, e.g., Paragraph 7*) of this contract; and each party to this contract was represented by an attorney in the negotiation and execution of the agreement].

[*OPTIONAL; add if participation in mediation is to be a prerequisite to recovery of attorneys' fees*]

If, for any dispute or claim to which this provision applies, any party commences an action without first attempting to resolve the matter through mediation, or refuses to mediate after a request has been made, then that party shall not be entitled to recover attorneys' fees, even if they would otherwise be available to that party in that action.

Legal Topics:

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

Contracts LawContract Conditions & ProvisionsGeneral OverviewContracts LawRemediesGeneral Overview



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27-75 California Legal Forms--Transaction Guide § 75.253

§ 75.253 Cumulative Remedy

[1] Comment--Use of Form

The form in [2], *below*, may be used when the contract grants a specific right or remedy for breach to one party, such as a lease provision giving the lessor a right of re-entry on nonpayment of rent. A cumulative remedy provision can clarify that the specific right or remedy granted by the contract is in addition to, rather than in lieu of, the legal and equitable remedies that otherwise would be available.

[2] FORM

Cumulative Remedy

[EITHER]

_____ [paragraph number]. **Cumulative Remedies.** The rights and remedies granted in this contract to _____ [name of party] in the event of default are cumulative, and the exercise of those rights and remedies shall be without prejudice to the enforcement of any other right or remedy available by law or authorized by this contract.

[OR]

_____ [paragraph number]. **Cumulative Remedies.** Pursuit of the foregoing remedies is no bar to the pursuit of any other remedies provided in this contract or authorized by law. Pursuit of the foregoing remedies is not a forfeiture or waiver of any amount due from _____ [defaulting party] under this contract or of any damages resulting from the violation of any of the provisions or promises in this contract. No waiver of any violation shall be considered a waiver of any other violation or breach of this contract, and forbearance to enforce one or more of the

remedies for default provided in this contract shall not be considered a waiver of that default.

Legal Topics:

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

Contracts LawContract Conditions & ProvisionsGeneral OverviewContracts LawRemediesGeneral Overview



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27-75 California Legal Forms--Transaction Guide § 75.254

§ 75.254 Service-of-Suit Clause**[1] Comment--Use of Form**

The form in [2], *below*, may be used when a party agrees to submit to the personal jurisdiction of designated courts for specified purposes related to the contract. It is commonly called a service-of-suit clause. Its purpose is to ease the burdens that the beneficiary of the clause might otherwise encounter in trying to obtain service of process sufficient to establish personal jurisdiction over the other party--for instance, when the other party is not a citizen of the United States and has no presence in the United States. This form is based on a clause in a disability insurance contract that was construed in *Boghos v. Certain Underwriters at Lloyd's of London* (2005) 36 Cal. 4th 495, 30 Cal. Rptr. 3d 787, 115 P.3d 68 .

When the contract contains both an arbitration clause [see § 75.250] and a service-of-suit clause, the arbitration clause should be qualified with the introductory phrase, "Notwithstanding every other provision of this contract ... " [see § 75.250[1][a]]. This phrase will tend to minimize the risk that a court might find a conflict between the arbitration clause and the service-of-suit clause [see § 75.250[1][g]].

[2] FORM**Service-of-Suit Clause**

____ [paragraph number]. **Service of Suit.** In the event of _____ [specify triggering event, e.g., the failure of _____ (name of first party) to pay any amount claimed to be due under this contract], _____ [name of first party] agrees that, at the request of _____ [name of aggrieved party], _____ [name of first party] will submit to the personal jurisdiction of a court of competent subject-matter jurisdiction in _____ [specify jurisdiction, e.g., California or the United States]. Nothing in this clause constitutes or should be understood to constitute a waiver of the right of _____ [name of aggrieved party] to commence an action in any court of competent jurisdiction in the United States, to remove an action to a United States district court, or to seek a transfer of a case to another court as permitted by the laws of the

United States or of any State. In any suit instituted against _____ *[name of first party]* on this contract, _____ *[name of first party]* agrees to abide by the final decision of the court or of any appellate court in the event of an appeal.

Legal Topics:

For related research and practice materials, see the following legal topics:
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27-75 California Legal Forms--Transaction Guide § 75.255

§ 75.255 Forum Selection Clause

[1] Comment

[a] Use of Form

The *form in § 75.255[2], below*, may be used when the parties agree to commence a lawsuit or other dispute resolution proceeding in a specified forum. This form gives the parties the option of either specifying a single forum in which all disputes must be brought, as will usually be the case, or, by the use of optional language, allowing each party to specify a different forum in which the other party must bring suit. The latter language may operate to mutually discourage lawsuits by insuring that any action by either party will be commenced in the defendant's preferred jurisdiction.

There is authority supporting the view that when a forum selection clause mandates the courts "of" a specified state, the intent is to limit the selected forum to the state courts; therefore, the federal courts in that state are excluded. A clause selecting courts "in" a specified state (such as the clause in [2], *below*), however, should be construed as including both the state courts and the federal courts in that state [*see Doe 1 v. AOL LLC (9th Cir. 2009) 552 F.3d 1077, 2009 U.S. App. LEXIS 875, at *11-*14*].

A forum selection clause is valid and may be given effect, in the court's discretion and in the absence of a showing that enforcement of the clause would be unreasonable [*Smith, Valentino & Smith, Inc. v. Superior Court (1976) 17 Cal.3d 491, 495-496, 131 Cal. Rptr. 374, 551 P.2d 1206* (evidence of mere inconvenience and additional expense was not sufficient to establish that forum selected was unreasonable); *see generally Aral v. Earthlink, Inc. (2005) 134 Cal. App. 4th 544, 557-559, 36 Cal. Rptr. 3d 229*; *see also Bugna v. Fike (2000) 80 Cal. App. 4th 229, 235-236, 95 Cal. Rptr. 2d 161* (defendants, who were not parties to contract but were closely related to contractual relationship, were entitled to enforce forum selection clause); *but see Berclain America Latina v. Baan Co. N.V. (1999) 74 Cal. App. 4th 401, 407-408, 87 Cal. Rptr. 2d 745* (because corporation normally does not assume rights, duties and benefits of another corporation that it acquires in stock purchase, acquiring corporation did not have standing to seek dismissal of action based on forum selection clause in contract signed by acquired corporation)].

A forum selection clause in an adhesion contract with a consumer is enforceable, whether or not the consumer actually reads it, as long as (1) the clause provides adequate notice to the consumer that he or she is agreeing to the selection of the forum identified in the contract and (2) enforcement of the clause would not be unreasonable. When the clause does not give that notice, the requisite mutual consent to that contractual term is lacking, and no valid contract with respect to that clause exists. If the clause would require the consumer to travel a great distance in order to sue for recovery of a small sum, then enforcement probably would be unreasonable [*Aral v. Earthlink, Inc.* (2005) 134 Cal. App. 4th 544, 560-561, 36 Cal. Rptr. 3d 229] .

A forum selection clause has a purpose different from a choice of law clause, and the forum selected pursuant to the one clause need not be, although it might be, the same as the forum designated in the other clause. For discussion and a form for a choice of law clause, see § 75.273.

In the event of litigation based on a contract containing a forum selection clause, if the defendant removes the action to a U.S. district court, the forum selection clause can provide the basis for a successful motion to remand the case to the state court [e.g., *Kamm v. IteX Corp.* (9th Cir. 2009) 568 F.3d 752, 2009 U.S. App. LEXIS 12709, at *13] .

[b] Venue Selection Clauses Generally Held Unenforceable

A contractual venue selection clause differs from a forum selection clause in that venue is purely an intrastate issue involving the selection of a county in which to hold the trial, rather than the selection of a court from among different states or nations. Venue selection clauses generally have been held invalid in California to the extent they disrupt statutory venue provisions, on the ground that they violate a legislatively declared public policy fixing the place for trial [see *General Acceptance Corp. v. Robinson* (1929) 207 Cal. 285, 288-289, 277 P. 1039; *Arntz Builders v. Superior Court* (2004), 122 Cal. App. 4th 1195, 1204, 19 Cal. Rptr. 3d 346; *Alexander v. Superior Court* (2003) 114 Cal. App. 4th 723, 725-727, 8 Cal. Rptr. 3d 111]. In one case, the California Supreme Court upheld a forum selection clause specifying Los Angeles County (rather than the entire state of California) as the forum [Smith, Valentino & Smith, Inc. v. Superior Court (1976) 17 Cal. 3d 491, 495-496, 131 Cal. Rptr. 374, 551 P.2d 1206]. However, that case distinguished rather than overruled earlier authority, on the ground that it involved a forum selection clause rather than a venue selection clause [Smith, Valentino Smith, Inc. v. Superior Court (1976) 17 Cal. 3d 491, 495, 131 Cal. Rptr. 374, 551 P.2d 1206], and subsequent opinions have adopted the position that this decision left unchanged the earlier rule invalidating venue selection clauses [Alexander v. Superior Court (2003) 114 Cal. App. 4th 723, 730, 8 Cal. Rptr. 3d 111; accord *Arntz Builders v. Superior Court* (2004), 122 Cal. App. 4th 1195, 1201, 19 Cal. Rptr. 3d 346].

[2] FORM

Forum Selection Clause

____ [paragraph number]. **Forum Selection.** Any legal action, court proceeding, or arbitration, to construe or enforce this contract or otherwise to resolve any dispute between the parties based on this contract, shall be commenced and maintained in an appropriate court or other forum in _____ [California or specify other state or country] [add if parties want to specify different forums depending on which party commences the action:; if commenced by _____ (name of party), or in _____ (specify different state or country) if commenced by _____ (name of other party)].

Legal Topics:

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

Civil Procedure Venue General Overview Contracts Law Contract Conditions & Provisions General Overview



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27-75 California Legal Forms--Transaction Guide § 75.256

§ 75.256 Judicial Reference

[1] Comment--Use of Form

The form in [2], *below*, may be used when the parties agree that any controversy arising under the contract will be submitted to a judicial reference.

In any action or proceeding based on a written contract, a referee may be appointed on the motion of a party to the contract if the court finds that a reference agreement exists between the parties to hear and determine any or all of the issues in an action or proceeding, whether of fact or of law, and to report a statement of decision [Code Civ. Proc. § 638; *see Woodside Homes of California, Inc. v. Superior Court* (2006) 142 Cal. App. 4th 99, 101, 47 Cal. Rptr. 3d 683 (provision for judicial reference was enforceable)].

Since a provision for judicial reference is authorized by Code Civ. Proc. § 638, it is different from a provision by which the parties agree expressly not to demand a trial by jury in any action, proceeding, or counterclaim arising out of or relating to the subject of the contract. The latter type of provision is unenforceable because it would be a predispute jury trial waiver not authorized by any statute [*Grafton Partners v. Superior Court* (2005) 36 Cal. 4th 944, 956, 32 Cal. Rptr. 3d 5, 116 P.3d 479; *Woodside Homes of California, Inc. v. Superior Court* (2006) 142 Cal. App. 4th 99, 102-104, 47 Cal. Rptr. 3d 683; *see Code Civ. Proc. § 631* (in civil cases, "a jury may only be waived" as provided in that statute, which does not authorize predispute agreements)].

[2] FORM

____ [paragraph number]. **Judicial Reference.** If either party commences any action or proceeding based on this contract [if desired, include language limiting or expanding the issues that parties want particularly to be covered by this provision, e.g., or relating to the condition, design, or construction of any portion of the property], then all of the issues in that action or proceeding, whether of fact or law, shall be submitted to judicial reference pursuant to *Code of Civil Procedure Section 638*.

Legal Topics:

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

Contracts LawContract Conditions & ProvisionsGeneral Overview



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27-75 California Legal Forms--Transaction Guide § 75.257

§ 75.257 Shortened Limitation Period

[1] Comment--Use of Form

The form in [2], *below*, may be used when the parties agree that an action on the contract will be subject to a shorter limitation period than the normal statutory period, which under California law is four years for an action on a written contract [*see Code Civ. Proc. §§ 312, 337*].

In California there is no public-policy objection to a contract provision shortening (or waiving) the statutory limitation period for an action on the contract, because a statute of limitations is regarded as a statute of repose, which does not embody a rule of public policy but merely recognizes a personal right for the benefit of a defendant, which the defendant may waive. No distinction can be made on the ground of public policy between the right of a defendant to waive the plea of the statute of limitations as a defense to an action and the same person's right, as a party to a contract, to waive a portion of the time granted by the statute for the commencement of an action [*Tebbets v. Fidelity & Cas. Co. (1909) 155 Cal. 137, 139, 99 P. 501*] . However, if a contract provision shortens the limitation period, the period fixed must be "not so unreasonable as to show imposition or undue advantage in some way" [*Beeson v. Schloss (1920) 183 Cal. 618, 622, 192 P. 292*] . This has come to mean that the shortened period must allow sufficient time for the plaintiff to "effectively pursue a judicial remedy" [*Moreno v. Sanchez (2003) 106 Cal. App. 4th 1415, 1430, 131 Cal. Rptr. 2d 684*] .

The provision should be confined to setting a shorter limitation period; it should not purport also to specify when the shorter period will begin, otherwise than by general reference to the time the cause of action accrues (as in *Code Civ. Proc. § 312*). If the provision purports to change the applicable legal rule as to when the cause of action accrues, then a court might refuse to enforce the provision, especially in a case in which the delayed-discovery rule normally would define when the cause of action accrues [*Moreno v. Sanchez (2003) 106 Cal. App. 4th 1415, 1430-1434, 131 Cal. Rptr. 2d 684*] .

A provision of this kind should be written in clear and simple language, so that there will be no doubt that the parties

intend to provide for a shorter limitation period. If the language is elliptical or ambiguous, requiring a court to determine what the parties intended to do, then the court will be inclined to construe the provision against the party invoking it as a substitute for the statute of limitations, and there will be some risk that the provision will not have that effect after all [*see, e.g., Western Filter Corp. v. Argan, Inc. (9th Cir. 2008) 540 F.3d 947, 2008 U.S. App. LEXIS 18147, at *9-*19*].

A choice-of-law provision [*see, e.g., § 75.273*] could indirectly have the same effect as the provision in [2], *below*, if the chosen law specifies a statutory period shorter than four years for an action on a written contract [*e.g., Hambrecht & Quist Venture Partners v. American Medical Internat., Inc. (1995) 38 Cal. App. 4th 1532, 1548, 46 Cal. Rptr. 2d 33* (court enforced choice-of-law provision in parties' contract, which indirectly provided for shorter limitation period than California law)].

[2] FORM

Shortened Limitation Period

_____ [paragraph number]. **Limitation Period.** An action on this contract may not be commenced except within _____ [specify period shorter than four years] after the cause of action shall have accrued. This provision establishes a shorter limitation period than the period provided by statute for commencing an action on a contract in writing.



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27-75 California Legal Forms--Transaction Guide §§ 75.258-75.259

[Reserved]

§§ 75.258[Reserved]



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27-75 California Legal Forms--Transaction Guide § 75.260

§ 75.260 Joint and Several Obligations**[1] Comment--Use of Form**

The form in [2], *below*, specifies whether an obligation imposed on several persons is joint, several, or joint and several.

An obligation or a right may be joint, several, or joint and several [Civ. Code § 1430]. If an obligation is joint, each of the obligors is responsible and may be compelled to render the entire performance. If an obligation is several, each obligor is responsible only for his or her individual promise [*Douglas v. Bergere* (1949) 94 Cal. App. 2d 267, 271, 210 P.2d 727] .

What type of rights and obligations a contract creates depends on the intention of the parties [*Carpenter v. Elmer R. Sly Co.* (1930) 109 Cal. App. 539, 545-546, 293 P. 162] . If the parties' intent is not clear, then an obligation imposed on several persons or a right created in favor of several persons is presumed to be joint [Civ. Code § 1431]. If all of the parties who join in making a promise receive some benefit from the consideration, then their promise is presumed to be joint and several [Civ. Code § 1659]. A promise made in the singular but executed by several persons is presumed to be joint and several [Civ. Code § 1660]. A contractual obligation is several only if words of severance disclose an intention to create a several obligation [*Douglas v. Bergere* (1949) 94 Cal. App. 2d 267, 271, 210 P.2d 727] .

[2] FORM**Joint and Several Obligations**

_____ [paragraph number]. **Joint and Several Obligations.** The obligations of _____ [names or designations of obligors] provided in _____ [specify, if appropriate, e.g., Paragraph 2.02 of] this contract are _____ [joint or several or joint and several].

Legal Topics:

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

Contracts LawContract Conditions & ProvisionsGeneral OverviewContracts LawThird PartiesJoint & Several Contracts



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27-75 California Legal Forms--Transaction Guide § 75.261

§ 75.261 Joint and Several Rights

[1] Comment--Use of Form

The form in [2], *below*, specifies whether a right granted to several persons is joint, several, or joint and several. For discussion of the law applicable to joint and several rights and obligations, see § 75.260[1].

[2] FORM

Joint and Several Rights

_____ [paragraph number]. **Joint and Several Rights.** The rights of _____ [names or designations of obligees] provided in _____ [specify, if appropriate, e.g., Paragraph 2.02 of] this contract are _____ [joint or several or joint and several]. _____ [Add, if desired, when rights are joint: Performance rendered to any of those parties extinguishes the obligation. However, no single party has the authority to accept performance that varies in any way from the specifications of this contract. Nonconforming performance may be accepted only with the prior written consent of all of those parties.]

Legal Topics:

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

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[Reserved]

§§ 75.262[Reserved]



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27-75 California Legal Forms--Transaction Guide § 75.270

§ 75.270 Entire Agreement

[1] Comment--Use of Form

The form in [2], *below*, which is sometimes called a merger clause or an integration clause [*see* § 75.16[2]], illustrates a common provision to the effect that the contract is the complete and exclusive expression of the parties' final agreement with respect to the included terms [*see, e.g., Masterson v. Sine* (1968) 68 Cal. 2d 222, 225-226, 65 Cal. Rptr. 545, 436 P.2d 561]. The contract therefore is subject to the parol evidence rule [*Code Civ. Proc.* § 1856; *see* § 75.16]. The use of this clause will preclude evidence on the issue of integration [*Pollyanna Homes, Inc. v. Berney* (1961) 56 Cal. 2d 676, 679-680, 16 Cal. Rptr. 345, 365 P.2d 401 ; *Blumenfeld v. R.H. Macy & Co.* (1979) 92 Cal. App. 3d 38, 44, 154 Cal. Rptr. 652] , but will not limit the admissibility of extrinsic evidence under exceptions to the parol evidence rule [*see* § 75.16[3]].

[2] FORM

Entire Agreement

____ [paragraph number]. **Entire Agreement.** This contract supersedes any and all other agreements, either oral or in writing, between the parties with respect to the subject of this contract. This contract contains all of the covenants and agreements between the parties with respect to the subject of this contract, and each party acknowledges that no representations, inducements, promises, or agreements have been made by or on behalf of any party except the covenants and agreements embodied in this contract. No agreement, statement, or promise not contained in this contract shall be valid or binding between the parties with respect to the subject of this contract.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract InterpretationGeneral Overview



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27-75 California Legal Forms--Transaction Guide § 75.271

§ 75.271 Entirety and Severability

[1] Comment--Use of Form

The form in [2], *below*, contains alternative provisions designating the contract or parts of a contract as entire or severable.

A contract is "entire" if all of the promised performances are interdependent so that any material breach justifies termination of the entire agreement by the other party. A contract is "severable" if performance by each party is divided into parts, so that performance of a given part by one party is the agreed exchange for performance of a corresponding part by the other party [*Lowy v. United Pacific Ins. Co.* (1967) 67 Cal. 2d 87, 91-92, 60 Cal. Rptr. 225, 429 P.2d 577] . Whether a contract is severable or entire depends on its language and subject matter, and the question is one of interpreting the intent of the parties [*Keene v. Harling* (1964) 61 Cal. 2d 318, 320, 38 Cal. Rptr. 513, 392 P.2d 273] . A contract clause is not severable if it is essential to the contract [*Eckles v. Sharman* (10th Cir. 1977) 548 F.2d 905, 909 (applying California law)].

The Commercial Code establishes a special rule for the severability of contracts for the sale of goods [see *Com. Code* § 2307; Ch. 52, *Sales of Goods Under the Uniform Commercial Code*].

If a contract has but one object, then the entire contract is void if that object is illegal, even if the object is only illegal in part. If that one object is entirely impossible to perform, or wholly unascertainable, then the entire contract is void [Civ. Code § 1598]. However, if a contract has several distinct objects, then any of these objects that is lawful is valid, despite the illegality of the other objects [Civ. Code § 1599; see, e.g., *Birbrower, Montalbano, Condon & Frank v. Superior Court* (1998) 17 Cal. 4th 119, 137-140, 140, 70 Cal. Rptr. 2d 304, 949 P.2d 1 (attorney's fee agreement not entirely unenforceable because of New York law firm's unauthorized practice of law in California; statutory violation did not preclude recovery under agreement for limited services performed outside California)].

[2] FORM

Entirety or Severability

[EITHER]

_____ [paragraph number]. **Nonseverability.** This contract is entire as to all of the performances to be rendered under it. Breach of any of the performances to be rendered by _____ [identify party] shall be a breach of the entire agreement [and shall give _____ (identify party) the right to terminate this contract].

[OR]

_____ [paragraph number]. **Severability.** The performance to be rendered under this contract is divided into _____ [specify, e.g., three parts], namely _____ [describe generally, e.g., (1) leveling the property, (2) building the road, and (3) landscaping the grounds]. The breach of any one part shall not affect the right of _____ [identify party, e.g., Contractor] to recover the contract price on the other parts.

[OR]

_____ [paragraph number]. **Severability.** If any term of this contract is held by a court of competent jurisdiction to be void or unenforceable, the remainder of the contract terms shall remain in full force and effect and shall not be affected.

[OR]

_____ [paragraph number]. **Severability.** If any part of this contract is declared invalid for any reason, this ruling shall not affect the validity of the rest of the agreement. The other parts of the agreement shall remain in effect as if the agreement had been executed without the invalid part. The parties declare that they intend and desire that the remaining parts of the agreement continue to be effective without any part or parts that have been declared invalid.

Legal Topics:

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

Contracts Law Contract Interpretation General Overview Contracts Law Contract Interpretation Severability



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27-75 California Legal Forms--Transaction Guide § 75.272

§ 75.272 Effect of Captions and Headings

[1] Comment--Use of Form

The form in [2], *below*, limits the effect of captions or headings on the construction of the contract, to make it clear that the captions or headings are not a part of the contract and are not to be used in interpreting the contract.

Although a caption may not be used to contradict the clear language of a contract, a caption may be examined to help determine the intent of the parties if the language of the contract is doubtful or ambiguous [*Wise v. Westchester Fire Insurance Company* (10th Cir. 1972) 463 F.2d 386, 389 (caption was misleading enough to confuse policyholder about scope of coverage; applying California law)].

[2] FORM

Effect of Captions

____ [paragraph number]. **Effect of Captions.** Captions in this contract are for convenience and reference only. The words in the captions in no way explain, modify, amplify, or interpret this contract.

Legal Topics:

For related research and practice materials, see the following legal topics:
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27-75 California Legal Forms--Transaction Guide § 75.273

§ 75.273 Choice of Law

[1] Comment

[a] Use of Form

The form in [2], *below*, illustrates three ways to specify the law that will govern the interpretation of the contract. One is a simple agreement to be governed by the law of a particular state. Another is a more detailed agreement. The third alternative states that the contract is to be deemed to have been entered into in a particular state.

Two related clauses could be included in the contract. For discussion and a form for a service-of-suit clause (by which a party would agree to submit to the jurisdiction of the courts of a specified state or country), see § 75.254. For discussion and a form of a forum selection clause (by which a party would agree to commence a lawsuit or similar proceeding in a specified state or country), see § 75.255.

[b] Governing Law

Generally, a contract is to be interpreted according to the law and usage of the place where it is to be performed. If the contract does not indicate a place of performance, it is to be interpreted according to the law and usage of the place where it was made [*Civ. Code § 1646*].

The parties to a contract for a transaction having a value of at least \$250,000 (including transactions covered by *Com. Code § 1301(a)*) may agree that California law will govern the agreement, regardless of whether the agreement bears a reasonable relation to California. This provision does not apply to agreements (1) for labor or personal services, (2) for transactions primarily for personal, family, or household purposes, or (3) to the extent otherwise provided by *Com. Code § 1301(c)* [*Civ. Code § 1646.5*].

If there has been no effective choice of law in the contract, what law governs depends on a weighing of the interests of the litigants and the jurisdictions involved [*Travelers Ins. Co. v. Workmen's Comp. App. Bd.* (1967) 68 Cal. 2d 7,

11-12, 64 Cal. Rptr. 440, 434 P.2d 992 ; *Buskuhl v. Family Life Ins. Co.* (1969) 271 Cal. App. 2d 514, 521, 76 Cal. Rptr. 602] .

[c] Effect of Choice of Law Clause in Contract

The intention of the parties as reflected in a choice of law clause normally is controlling unless the choice made contravenes the settled public policy of the forum or was chosen to evade an otherwise applicable forum law [*Gamer v. duPont Glore Forgan, Inc.* (1976) 65 Cal. App. 3d 280, 287, 135 Cal. Rptr. 230 ; see *Richards v. Lloyd's of London* (9th Cir. 1997) 135 F.3d 1289, 1294-1296 (antiwaiver provisions of Securities Act of 1933 and Securities Exchange Act of 1934 did not void contract's choice of law provision in international transaction); *America Online, Inc. v. Superior Court* (2001) 90 Cal. App. 4th 1, 15, 108 Cal. Rptr. 2d 699 (antiwaiver provisions of Consumers Legal Remedies Act voided contract's choice of law provision)]. In determining whether another state's law conflicts with the fundamental policy of California, it would be error for the court to isolate the differences between an applicable California law and the other state's comparable law and then determine whether the isolated differences in the two states' laws reflect a fundamental policy. This approach would lead the court to consider each portion of the compared laws separately, which would minimize the impact of any deviation from the requirements of the California law. It is erroneous because it fails to consider the California law as an integrated whole, the particular parts of which reinforce each other [*Brack v. Omni Loan Co., Ltd.* (2008) 164 Cal. App. 4th 1312, 1325, 80 Cal. Rptr. 3d 275] .

A choice of foreign law that violates public policy may be upheld if the contacts with the forum are minimal and the contacts with the foreign state are great [*Gamer v. duPont Glore Forgan, Inc.* (1976) 65 Cal. App. 3d 280, 286-290, 135 Cal. Rptr. 230 ; *Ury v. Jewelers Acceptance Corp.* (1964) 227 Cal. App. 2d 11, 16-20, 38 Cal. Rptr. 376] . The choice of law will not be upheld if the state chosen has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the choice [see *International Business Machines Corporation v. Bajorek* (9th Cir. 1999) 191 F.3d 1033, 1041-1042 (upholding choice of New York law in stock option agreement, finding that New York did not lack substantial relationship to employer, employee, and agreement)]. The fact that one of the parties resides in another state gives the parties a reasonable ground for choosing that state's law [*Nedlloyd Lines B.V. v. Superior Court* (1992) 3 Cal. 4th 459, 467, 11 Cal. Rptr. 2d 330, 834 P.2d 1148 ; *Hughes Electronics Corp. v. Citibank Delaware* (2004) 120 Cal. App. 4th 251, 258, 15 Cal. Rptr. 3d 244] . The same should be true when there is an intended third-party beneficiary of the contract, and that person resides in the chosen state [*ABF Capital Corp. v. Berglass* (2005) 130 Cal. App. 4th 825, 835, 30 Cal. Rptr. 3d 588] . However, in determining whether a contractual provision, by which another state's law is chosen, should be enforced in California when the other state's law conflicts with California law, a court will consider which state, in the circumstances presented, would suffer greater impairment of its policies if the other state's law were applied [*Brack v. Omni Loan Co., Ltd.* (2008) 164 Cal. App. 4th 1312, 1329, 80 Cal. Rptr. 3d 275 (choice of Nevada law, in consumer-loan contract of adhesion, was not enforceable)].

An action may be brought in a California court against a foreign corporation or nonresident person if the action arises out of or relates to an agreement for which a choice of California law has been made by the parties. The agreement must relate to a transaction having a value of at least \$1 million and must contain a provision in which the foreign corporation or nonresident person agrees to submit to the jurisdiction of California courts [Code Civ. Proc. § 410.40; cf. *Farb v. Superior Court* (2009) 174 Cal. App. 4th 678, 94 Cal. Rptr. 3d 586, 686 (Code Civ. Proc. § 366.2, creating one-year limitation period for contract action against party who died during normal limitation period, barred action against deceased party's estate, which was Texas entity, for enforcement of contract that had been made in California and in which parties had provided that California law would govern)].

If the contract contains an arbitration provision [see § 75.250] and also provides that the law of California (or another state) will govern issues relating to the contract, then the limited preemptive aspects of the Federal Arbitration Act [see 9 U.S.C. § 1 et seq.; see generally *California Forms of Pleading and Practice*, Ch. 32, *Contractual Arbitration: Agreements and Compelling Arbitration*, § 32.24 (Matthew Bender); see also *Cronus Invs., Inc. v. Concierge Servs.* (2005) 35 Cal. 4th 376, 380, 25 Cal. Rptr. 3d 540, 107 P.3d 217 (Federal Arbitration Act "applies to and favors the

enforcement of arbitration agreements affecting interstate commerce")]] will not be applied. Even so, California law incorporates many of the basic policy objectives contained in the Federal Arbitration Act, including the presumption in favor of arbitrability [*EFund Capital Partners v. Pless* (2007) 150 Cal. App. 4th 1311, 1319-1320, 59 Cal. Rptr. 3d 340 (contract provided, "The interpretation and enforcement of this Agreement shall be governed by California Law as applied to residents of the State of California relating to contracts exercised in and to be performed solely within the State of California.")].

[2] FORM

Choice of Law

[EITHER]

_____ [paragraph number]. **Governing Law.** This contract shall be governed by and construed in accordance with the law of California.

[OR]

_____ [paragraph number]. **Governing Law.** The validity of this contract and of any of its terms or provisions, as well as the rights and duties of the parties under this contract, shall be construed pursuant to and in accordance with the law of California.

[OR]

_____ [paragraph number]. **Governing Law.** This contract shall be deemed to have been entered into in California, and all questions of the validity, interpretation, or performance of any of its terms or of any rights or obligations of the parties to this contract shall be governed by California law.

Legal Topics:

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

Civil Procedure Federal & State Interrelationships Choice of Law General Overview Contracts Law Contract Conditions & Provisions General Overview Contracts Law Contract Interpretation General Overview



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27-75 California Legal Forms--Transaction Guide § 75.274

§ 75.274 Definitions

[1] Comment--Use of Form

The form in [2], *below*, illustrates a basic format for a definitional provision. Contract terms should be defined when they have a special meaning or might otherwise be misunderstood.

[2] FORM

Definitions

_____ [paragraph number] . **Definitions.** For the purposes of this contract, the following words and phrases have the meanings assigned below:

- (a) " _____ " shall mean _____ [specify].
- (b) " _____ " shall mean _____ [specify].
- (c) " _____ " shall mean _____ [specify].

Legal Topics:

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

§§ 75.275[Reserved]



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7. Assignment

27-75 California Legal Forms--Transaction Guide § 75.280

§ 75.280 Assignability

[1] Comment--Use of Form

The form in [2], *below*, illustrates alternative provisions that may be used to state whether a party's rights and obligations under the contract may be transferred.

California law generally favors the free transferability of property [*see, e.g., Civ. Code §§ 953-955.1, 1044, 1458* (transfer of things in action; property of any kind may be transferred, except as otherwise provided; transfer of rights arising out of obligations)], but the burden of an obligation may not be transferred without the consent of the party entitled to its benefit [*Civ. Code § 1457*]. This does not mean that a third party may not assume the obligations of the contract by means of an assignment, nor does this mean that a third party is barred from enforcing the contract once he or she has fully performed [*Anderson v. De Urioste* (1892) 96 Cal. 404, 407, 31 P. 266 ; *Wiseman v. Sklar* (1930) 104 Cal. App. 369, 374, 285 P. 1081] . The rule merely prevents an assignor from being relieved of contractual obligations by an assignment, unless and until the obligee consents.

The parties may provide in the contract that it is not assignable, and such a provision will be effective [*Thomas v. Thomas* (1961) 192 Cal. App. 2d 771, 780-782, 13 Cal. Rptr. 872] . Furthermore, certain types of contracts are not assignable. Contracts that call for the skill, credit, or other personal quality of the promisor are not assignable or survivable [*Coykendall v. Jackson* (1936) 17 Cal. App. 2d 729, 731, 62 P.2d 746] . If only part of the required performance is personal, the rest of the contract may be assigned once the personal part of the obligation has been discharged [*Fenn v. Pickwick Corp.* (1931) 117 Cal. App. 236, 241, 4 P.2d 215] .

The assignment of wages or salary is regulated by statute [*see Lab. Code § 300*].

[2] FORM

Assignment

[EITHER]

_____ [paragraph number] . **Assignment.** This contract may be assigned by either party on written notice to the other party.

[OR]

_____ [paragraph number] . **Assignment.** _____ [name of party] has the right to sell, assign, or transfer this contract with all of _____ [his or her] rights, title, or interest in it to any person, firm, or corporation at any time during the term of this contract, and any such assignee shall acquire all of the rights and assume all of the obligations of _____ [name of party] under this contract.

[OR]

_____ [paragraph number] . **Assignment.** This contract may be assigned by _____ [name of party] on _____ [specify notice period, e.g., 10 days] written notice of the assignment by personal delivery or registered mail to _____ [name of other party] at _____ [address of other party].

[OR]

_____ [paragraph number] . **Assignment.** _____ [name of obligor] may assign _____ [his or her or its] obligations under this contract provided that _____ [specify conditions of assignment, e.g., the assignee is capable of performing these obligations to the satisfaction of _____ (name of obligee)].

[OR]

_____ [paragraph number] . **Assignment.** If _____ [name of obligor] wishes to conduct business as a corporation, then _____ [name of obligee] will consent to the assignment of _____ [name of obligor]'s obligations to the corporation, provided that _____ [specify conditions].

[OR]

_____ [paragraph number] . **Assignment.** This contract may be assigned by _____ [name of party] only on payment of \$ _____ to _____ [name of other party].

Legal Topics:

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

Contracts Law Contract Conditions & Provisions General Overview Contracts Law Performance Assignment General Overview



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27-75 California Legal Forms--Transaction Guide § 75.281

§ 75.281 Prior Written Consent to Assignment

[1] Comment--Use of Form

The form in [2], *below*, contains alternative clauses restricting the rights of one or both of the parties to assign contractual rights and/or obligations. Each clause requires the written consent of the other party as a prerequisite to assignment.

The parties may provide in the contract that it is not assignable, and such a provision will be effective [*Thomas v. Thomas (1961) 192 Cal. App. 2d 771, 780-782, 13 Cal. Rptr. 872*]. The parties may not restrict assignability, however, if to do so would violate a statute or public policy. For example, life and disability insurance policies are assignable by statute [*Ins. Code § 10130*], and a clause prohibiting such assignments in a fraternal society constitution is ineffective [*Pimentel v. Conselho Supremo, Etc. (1936) 6 Cal. 2d 182, 190, 57 P.2d 131*]. A general prohibition against the assignment of a contract does not bar the assignment of money due or to become due under the contract or of damages for the breach of the contract [*Trubowitch v. Riverbank Canning Co. (1947) 30 Cal. 2d 335, 339-340, 182 P.2d 182*].

A transfer by operation of law occurs when rights under a contract are transferred by the operation of a statute or a principle of law rather than by an express assignment. Common examples of transfer by operation of law include the passing of property to heirs by intestate succession, the vesting of the assets of a bankrupt in the trustee in bankruptcy, and the transfer of ownership of one corporation to another through acquisition or merger. A contract clause prohibiting voluntary assignment does not restrict transfer by operation of law [*California Packing Corp. v. Lopez (1929) 207 Cal. 600, 603, 279 P. 664*], but a clause prohibiting assignment or transfer either voluntarily or "by operation of law or otherwise" does bar the passage of contract rights under a will [*Miller v. San Francisco Newspaper Agency (1985) 164 Cal. App. 3d 315, 317, 210 Cal. Rptr. 159*].

[2] FORM

Prior Written Consent to Assignment

[EITHER]

_____ [paragraph number] . **Assignment.** This contract may not be assigned by either party without the prior written consent of the other party.

[OR]

_____ [paragraph number] . **Assignment.** Neither this contract, nor any money due or to become due under this contract, may be assigned by either party without the prior written consent of the other party.

[OR]

_____ [paragraph number] . **Assignment.** _____ [name of party entitled to right] may not assign this contract or any _____ [right accruing or duty or obligation of performance] under this contract without the prior written consent of _____ [name of other party].

[OR]

_____ [paragraph number] . **Assignment.** _____ [name of party to be bound] shall not sell, assign, transfer, or encumber this contract or any right or interest in or under this contract, or suffer or permit any sale, assignment, transfer, or encumbrance to occur by operation of law, without the prior written consent of _____ [name of other party]. In the event of any sale, transfer, or assignment consented to by _____ [name of other party], the transferee shall agree in writing with _____ [name of other party] personally to assume, perform, and be bound by the covenants, obligations, and agreements contained in this contract.

Legal Topics:

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

Contracts Law Contract Conditions & Provisions General Overview Contracts Law Performance Assignment Consent



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27-75 California Legal Forms--Transaction Guide § 75.282

§ 75.282 Effect of Contract on Successors and Assigns

[1] Comment--Use of Form

The form in [2], *below*, contains alternative versions of a clause providing that the successors or assigns of the parties will assume the burdens and obligations of the contract as well as obtain the rights and benefits.

The mere assignment of rights and benefits under an executory contract does not impose on the assignee the obligations of the assignor, unless the assignee consents to assume those obligations [*Gregers v. Peterson Ice Cream Co., Inc.* (1958) 158 Cal. App. 2d 746, 751, 323 P.2d 572] . Whether the assignee has assumed the obligations depends on the intent of the parties to the assignment [*Foreman Roofing Inc. v. United Union of Roofers etc. Workers* (1983) 144 Cal. App. 3d 99, 107, 192 Cal. Rptr. 439] , which may be determined from the words of the parties, the subject matter of the contract [*Weidner v. Ziegler* (1933) 218 Cal. 345, 349, 23 P.2d 515 ; *Gregers v. Peterson Ice Cream Co., Inc.* (1958) 158 Cal. App. 2d 746, 751, 323 P.2d 572] , or the conduct of the parties [*Foreman Roofing Inc. v. United Union of Roofers etc. Workers* (1983) 144 Cal. App. 3d 99, 107, 192 Cal. Rptr. 439] . Assumption of the obligations of an assigned contract may be implied by acceptance of the benefits of the contract [Civ. Code § 1589; *Aeronaves de Mexico, S.A. v. McDonnell Douglas* (9th Cir. 1982) 677 F.2d 771, 773 ; *Melchior v. New Line Productions, Inc.* (2003) 106 Cal. App. 4th 779, 788-790, 131 Cal. Rptr. 2d 347 (assignee of film production company, which accepted benefits of company's original agreement with author, also accepted obligations of original agreement despite different terms in assignment agreement); *Gregers v. Peterson Ice Cream Co., Inc.* (1958) 158 Cal. App. 2d 746, 751-752, 323 P.2d 572 ; see *Recorded Picture Company [Productions] Ltd. v. Nelson Entertainment, Inc.* (1997) 53 Cal. App. 4th 350, 362, 61 Cal. Rptr. 2d 742] . If the contract is by its terms expressly made binding on the successors and assigns of the parties, then no express assumption of obligations by the assignee is necessary [*Weidner v. Ziegler* (1933) 218 Cal. 345, 350, 23 P.2d 515] .

[2] FORM

Effect of Contract on Successors and Assigns

[EITHER]

_____ [paragraph number] . **Successors and Assigns.** This contract shall be binding on and inure to the benefit of each party's heirs, executors, administrators, successors, and assigns.

[OR]

_____ [paragraph number] . **Successors and Assigns.** This contract shall inure to the benefit of and bind the successors and assigns of _____ [name of corporate party] and shall be personally binding on and inure to the benefit of the heirs, executors, administrators, successors, and assigns of _____ [name of individual party].

Legal Topics:

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

Contracts LawContract Conditions & ProvisionsGeneral OverviewContracts LawPerformanceAssignmentGeneral Overview



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27-75 California Legal Forms--Transaction Guide §§ 75.283-75.289

[Reserved]

§§ 75.283[Reserved]



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27-75 California Legal Forms--Transaction Guide § 75.290

§ 75.290 Incorporation by Reference

[1] Comment--Use of Form

The form in [2], *below*, illustrates ways in which documents may be incorporated into the contract by reference.

The parties may incorporate other documents by reference, and the incorporated documents need not be physically attached to the contract [*King v. Larsen Realty, Inc. (1981) 121 Cal. App. 3d 349, 357, 175 Cal. Rptr. 226* ; *Williams Constr. Co. v. Standard-Pacific Corp. (1967) 254 Cal. App. 2d 442, 454, 61 Cal. Rptr. 912*] . The reference must be clear and unequivocal [see *Kleveland v. Chicago Title Ins. Co. (2006) 141 Cal. App. 4th 761, 763, 46 Cal. Rptr. 3d 314* (arbitration clause in title insurance policy was not incorporated by reference into preliminary title report and so was not binding on insured because arbitration was not mentioned in that report and report referred to policy that was different from what was actually issued by insurer)], and the terms of the incorporated document must be known or easily available to the parties [*Williams Constr. Co. v. Standard-Pacific Corp. (1967) 254 Cal. App. 2d 442, 454, 61 Cal. Rptr. 912*] . If the reference is made for a specified purpose, then the incorporated document becomes part of the contract for that purpose only [*Valley Constr. Co. v. Calistoga (1946) 72 Cal. App. 2d 839, 841, 165 P.2d 521*] .

[2] FORM

Incorporation by Reference

[EITHER]

_____ [text preceding incorporation reference] in accordance with _____ [describe document, e.g., ABC Corporation's 1987 annual schedule of fees], which is attached to this contract as Exhibit A and made a part of this contract.

[OR]

_____ [text preceding incorporation reference] in accordance with _____ [identify document and describe means of access to it, e.g., the rate schedule prepared by Smith and Sons, Inc., dated _____, and published by that firm], which is hereby incorporated into this contract as if fully set forth herein.

[OR]

_____ [text preceding incorporation reference] in accordance with _____ [state portion of document being incorporated, e.g., pages 2 through 6 and 25 through 29 of] _____ [identify document, e.g., the plans and specifications prepared by XYZ, Inc., dated _____].

[OR]

_____ [paragraph number] . **Related Agreement.** This contract is subject to _____ [describe document, e.g., financing terms in accordance with the financing terms of that agreement dated _____ and signed by the parties, relating to an earlier transaction between the parties concerning _____ (specify)], which is hereby incorporated by reference into this contract.

Legal Topics:

For related research and practice materials, see the following legal topics:
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27-75 California Legal Forms--Transaction Guide § 75.291

§ 75.291 Enumeration of Class

[1] Comment--Use of Form

The form in [2], *below*, illustrates how to enumerate a list or class without unintentionally excluding items meant to be included. The use of a general word or phrase in connection with a list of specifics may create a risk that the general word or phrase will be limited beyond the intent of the parties, by application the rule of *ejusdem generis*, that is, general expressions are limited by particular expressions [see *Civ. Code* § 3534; *Code Civ. Proc.* § 1859; *National Ins. Underwriters v. Carter* (1976) 17 Cal. 3d 380, 386, 131 Cal. Rptr. 42, 551 P.2d 362 ; *Bader v. Coale* (1941) 48 Cal. App. 2d 276, 279, 119 P.2d 763] .

[2] FORM

Enumeration of Class

_____ [statement that includes general description of class, e.g., Tenant agrees to maintain and keep in repair all property of Landlord on the premises], including, but not limited to, _____ [examples of items within class, e.g., machinery, furniture, and heating, air conditioning, and ventilating systems].

Legal Topics:

For related research and practice materials, see the following legal topics:
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27-75 California Legal Forms--Transaction Guide § 75.292

§ 75.292 Place of Performance**[1] Comment--Use of Form**

The form in [2], *below*, may be used to specify the place where the obligor is to perform the contractual obligation. If no place is specified for performance, the obligor must seek out the obligee to tender performance [*Civ. Code* §§ 1488, 1489; *Hale v. Bohannon* (1952) 38 Cal. 2d 458, 467, 241 P.2d 4; *Davis v. Cook Bros. Truck & Equip. Co.* (1959) 175 Cal. App. 2d 667, 668, 346 P.2d 890]. This rule, however, will yield to the intent of the parties as revealed by specific contract provisions [*Burr v. Western States Life Ins. Co.* (1931) 211 Cal. 568, 575, 296 P. 273] or by reasonable inferences from the contract or other circumstances [*Hale v. Bohannon* (1952) 38 Cal. 2d 458, 466-468, 241 P.2d 4].

[2] FORM**Place of Performance**

[EITHER]

_____ [paragraph number]. **Place of Performance.** This contract is to be performed at
 _____ [specify place].

[OR]

_____ [paragraph number]. **Place of Performance.** The payment that _____ [name of obligor] is required by _____ [specify part of contract, e.g., Paragraph 2.02 of] this contract to make to _____ [name of obligee] shall be made at _____ [specify place].

Legal Topics:

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

Contracts LawContract Conditions & ProvisionsGeneral OverviewContracts LawPerformanceGeneral Overview



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27-75 California Legal Forms--Transaction Guide § 75.293

§ 75.293 Payment of Taxes Arising From Transaction**[1] Comment--Use of Form**

The form in [2], *below*, specifies responsibility for payment of taxes arising from the transaction.

Payment of a taxpayer's income taxes by another person constitutes gross income to the taxpayer unless excluded by law [*Treas. Reg. § 1.61-14(a)*]; see *Old Colony Trust Co. v. Commissioner* (1928) 279 U.S. 716, 729, 49 S. Ct. 499, 73 L. Ed. 918]. This rule has been applied to the payment of a utility corporation's income tax by its customers pursuant to a contract and a tariff [*Safe Harbor Water Power Corporation v. United States* (1962) 303 F.2d 928, 929-931, 933, 157 Ct. Cl. 912] and to the payment of an employee's income tax by the employer pursuant to a company resolution [*Old Colony Trust Co. v. Commissioner* (1928) 279 U.S. 716, 729, 49 S. Ct. 499, 73 L. Ed. 918]. A third party's agreement to pay "all" of the taxpayer's income taxes may be considered an agreement to pay the additional tax on the income generated by payment of the original tax, and so on [*Safe Harbor Water Power Corporation v. United States* (1962) 303 F.2d 928, 933-934, 157 Ct. Cl. 912].

[2] FORM**Payment of Taxes Arising From Transaction**

_____ [paragraph number] . **Payment of Taxes.** _____ [name of party] agrees to pay all taxes of every kind, federal, state, or municipal, assessed against _____ [name of other party] by reason of this transaction, except that _____ [name of party] will not pay any [federal or state income taxes assessed against _____ (name of other party) or tax on the income resulting from _____ (his or her or its) payment of _____ (name of other party)'s state or federal taxes or any interest or penalties resulting from _____ (name of other party)'s tax obligations].

Legal Topics:

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

Contracts LawContract Conditions & ProvisionsGeneral OverviewTax LawFederal Tax Administration &
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27-75 California Legal Forms--Transaction Guide § 75.294

§ 75.294 Notices Between Parties**[1] Comment--Use of Form**

The form in [2], *below*, specifies when, how, and where notices (or other papers, or things) will be given between the parties.

[2] FORM**Notices Between Parties**

_____ [paragraph number]. **Notices.** Any _____ [notice or tender or delivery] required to be given under this contract may be given by personal delivery in writing or by registered or certified mail, postage prepaid, return receipt requested. Notice shall be deemed communicated as of _____ [mailing or actual receipt or _____ (number) days from mailing]. Mailed notices shall be addressed as set forth below, but each party may change that party's address by written notice in accordance with this paragraph.

To: _____ [name and designation of party]
 _____ [address]

To: _____ [name and designation of party]
 _____ [address]

Legal Topics:

For related research and practice materials, see the following legal topics:
 Contracts Law Contract Conditions & Provisions General Overview



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27-75 California Legal Forms--Transaction Guide § 75.295

§ 75.295 Execution and Signatures

[1] Comment

[a] Use of Form

The form in [2], *below*, consists of alternative provisions illustrating ways to execute (sign) the contract.

[b] Signatures

An instrument is executed by subscribing it and delivering it [*Code Civ. Proc.* § 1933]. "Subscription" and "signature" should be interpreted as synonyms; the only requirement is that the document be signed somewhere [*Cal. Canneries Co. v. Scatena* (1897) 117 *Cal.* 447, 450, 49 *P.* 462] . A signature need not be the party's legal name, but may be an abbreviated name, initials, or a nickname [*Weiner v. Mullaney* (1943) 59 *Cal. App. 2d* 620, 633, 140 *P.2d* 704] . The signature need not be handwritten; it can be typed [*Weiner v. Mullaney* (1943) 59 *Cal. App. 2d* 620, 634, 140 *P.2d* 704] , printed, stamped [*Marks v. Walter G. McCarty Corp.* (1949) 33 *Cal. 2d* 814, 820, 205 *P.2d* 1025] , or written by the hand of another [*Kadota Fig Asso. of Producers v. Case-Swayne Co.* (1946) 73 *Cal. App. 2d* 815, 819, 167 *P.2d* 523] . The key requirement is that the signature must be placed on the writing or adopted by the party to be charged with the intention of authenticating the writing [*Marks v. Walter G. McCarty Corp.* (1949) 33 *Cal. 2d* 814, 820, 205 *P.2d* 1025 ; *see Com. Code* § 1201(37) ("signed" includes using any symbol executed or adopted with present intention to adopt or accept writing); *see also McNear v. Petroleum Export Corp.* (1929) 208 *Cal.* 162, 167, 280 *P.* 684 (signer's intention must appear on face of document and may not be proved by parol evidence)].

A signature may be made by a mark. The signer's name should be written near the mark by another who signs as a witness; and there should be two subscribing witnesses [*see Civ. Code* § 14; *Code Civ. Proc.* § 17(a); *Penal Code* § 7; *Rev. & Tax. Code* § 18].

A contract may also be "signed" (executed) electronically. For discussion of the rules governing electronic signatures [*see Civ. Code* § 1633.1 *et seq.*], *see* § 75.17.

[c] Seals

Distinctions between sealed and unsealed instruments have been abolished in California [*Civ. Code* § 1629; *Code Civ. Proc.* § 1932]. Thus a writing under seal may be changed or discharged by a writing not under seal [*Code Civ. Proc.* § 1932], and an unsealed written agreement for the compromise or settlement of a debt is as obligatory as if a seal were affixed [*Code Civ. Proc.* § 1934]. The execution of instruments does not depend on the affixing of a seal [*Code Civ. Proc.* § 1933]. Corporations may adopt and use a seal, but failure to affix a seal does not affect the validity of any instrument executed by the corporation [*Corp. Code* § 207(a)].

A seal is a particular sign made to attest, in the most formal manner, the execution of an instrument [*Code Civ. Proc.* § 1931]. A private seal is a stamp or impression on paper, or on any substance attached to the paper, that is capable of receiving a visible impression [*Code Civ. Proc.* § 1931; *Civ. Code* § 1628]. The seal may be made by any instrument, even by writing the word "seal" against the signature of the writer. A scroll or sign made in a sister state or a foreign country, and there recognized as a seal, must be so regarded in California [*Code Civ. Proc.* § 1931].

[d] Residence of Parties

The state and county of residence of each party need not be shown in the execution clause (or anywhere else, although often a party's residence is shown in the notice clause or the preamble). If residence is stated, it would be relevant in determining the venue of an action founded on the contract [*Code Civ. Proc.* § 395].

[e] Place and Date of Execution

A contract usually states where it was executed. A contract will be interpreted according to the law and usage of the place where it was made, unless the contract indicates a place of performance that differs from the place it was made, in which case the law of the place of performance governs interpretation [*see Civ. Code* § 1646].

The date of execution usually appears at the beginning or the end, sometimes at both places. If the contract is to be executed by the parties at different times, a date blank may be placed next to each signature line.

[f] Effect of One Party Signing

The intention of the parties controls the effect of its being signed by only one party [*Kaneko v. Okuda* (1961) 195 Cal. App. 2d 217, 225, 15 Cal. Rptr. 792 ; *Helperin v. Guzzardi* (1951) 108 Cal. App. 2d 125, 128, 238 P.2d 141] . In the absence of any showing that the parties had a contrary intent, the parties signing may be bound, even though other parties have not signed [*Kaneko v. Okuda* (1961) 195 Cal. App. 2d 217, 225, 15 Cal. Rptr. 792] . A party who accepts the benefits of a contract is bound even if he or she does not sign [*Civ. Code* § 1589; *Fairlane Estates v. Carrico Constr. Co.* (1964) 228 Cal. App. 2d 65, 70, 39 Cal. Rptr. 35] .

[g] Acknowledgment

Acknowledgment is not necessary unless the contract is to be recorded [*see Ch. 27, Deeds and Recording*], or unless acknowledgment is specially required by a statute or regulation. For discussion and forms for acknowledgments, see California Forms of Pleading and Practice, Ch. 9, *Acknowledgments* (Matthew Bender).

[2] FORM**Execution and Signatures**

[EITHER]

Executed _____ [add, if desired: in _____ (specify number of executed copies, e.g., triplicate) on _____ [date], at _____ [city and state].

_____ [signature of party]

[typed name]

_____ [signature of party]

[typed name]

[OR, for parties signing at different times]

Executed on _____ [date], at _____ [city and state].

_____ [signature of party]

[typed name]

Executed on _____ [date] at _____ [city and state].

_____ [signature of party]

[typed name]

[OR, for signature by mark]

_____ [mark]

[name of person making mark]

_____ [name of person making mark], who is unable to write, made _____ [his or her] mark in my presence, and I signed _____ [his or her] name at _____ [his or her] request and in _____ [his or her] presence.

_____ [signature of witness who wrote name]

[typed name]

_____ [signature of second witness]

[typed name]

[OR, for signature by attorney in fact]

_____ [name of principal, signed by attorney in fact]

[principal's typed name]

By _____ [attorney's signature]

[typed name], Attorney in Fact

[OR, for signature by corporation]

_____ [typed name of corporation]
 By _____ [signature]
 [typed name and title]

[OR, for signature by limited liability company]

 [typed name of limited liability company], LLC
 By _____ [signature]
 [typed name],
 _____ [Member or Manager or other title]

[OR, for signature by partnership]

_____ [typed name of partnership],
 a California _____ [general or limited or limited liability partnership]
 By _____ [signature]
 [typed name], [for a limited partnership: General] Partner

[OR, for signature by executor or administrator]

_____ [signature]
 [typed name]

 [Executor or Administrator] of the
 Estate of _____, deceased

[OR, for signature by guardian or conservator]

_____ [signature]
 [typed name],
 _____ [Guardian or Conservator] of the
 _____ [person or estate or person and estate] of
 _____ [name],
 _____ [a minor or an incompetent
 or a conservatee].

[OR, for signature by trustee]

[signature]

[typed name], as Trustee of

[describe trust, e.g., the John W. Smith Family Trust
or the trust established by

(name of settlor) under a

(will or trust agreement) dated

(date)].

Legal Topics:

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

Contracts LawContract Conditions & ProvisionsGeneral OverviewContracts LawFormationExecution



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DIVISION V: CONTRACTS AND OBLIGATIONS
CHAPTER 76 ASSIGNMENTS OF RIGHTS AND OBLIGATIONS

27-76 California Legal Forms--Transaction Guide 76.syn

§ 76.syn Synopsis to Chapter 76: ASSIGNMENTS OF RIGHTS AND OBLIGATIONS

§ 76.01 California Statutes

[1] Assignments Generally

[2] Particular Circumstances

[a] Consumer Contracts

[b] Employment

[c] Security Transactions

§ 76.02 Federal Statutes

§§ 76.03-76.04 [Reserved]

§ 76.05 Annotations

§ 76.06 Text References

[1] Matthew Bender Sources

[2] Other Text References

§§ 76.07-76.09 [Reserved]

§ 76.10 Governing Law

§ 76.11 Assignment of Rights and Delegation of Duties

§ 76.12 Definitions

[1] Assignment

[2] Obligation

[3] Right

§ 76.13 Requirements for Valid Assignment

[1] Form

[2] Consideration

[3] Delivery

[4] Consent and Notice

§ 76.14 Rights and Liabilities of Assignees

[1] In General

[2] Contracts for Specific Consumer Services

[3] Priorities Among Assignees

§ 76.15 Liabilities of Assignor

§§ 76.16-76.99 [Reserved]

§ 76.100 Facts

Scope

§ 76.101 Documents

Scope

§§ 76.102-76.109 [Reserved]

§ 76.110 Type of Assignment to Be Drafted

Scope

§ 76.111 Assignability Issues

Scope

§ 76.112 Assignments Requiring Consent

Scope

§ 76.113 Assignments Requiring Notice

Scope

§§ 76.114-76.119 [Reserved]

§ 76.120 Preparation and Execution of Assignment

Scope

§ 76.121 Consent to Assignment

Scope

§ 76.122 Notice of Assignment

Scope

§§ 76.123-76.199 [Reserved]

§ 76.200 Assignment of Contract

[1] Comment

[a] Use of Form

[b] Validity of Assignment of Contract

[c] Contracts Personal in Nature

[d] Contractual Provisions Barring Assignment

[e] Contracts for Sale of Goods

[2] FORM

Assignment of Contract

§ 76.201 Assignment of Cause of Action

[1] Comment

[a] Use of Form

[b] Assignability of Causes of Action

[c] Assignability of Tort Claims

[d] Superseded Rights of Assignor

[2] FORM

Assignment of Cause of Action

§ 76.202 Assignment of Wages

[1] Comment

[a] Use of Form

[b] Assignment of Wages--In General

[c] Future Earnings

[d] Provisions Required by Statute

[e] Formalities Applicable to Minors

[f] Employer's Role in Assignment

[g] Wage Assignments in Consumer Contracts

[2] FORM

Assignment of Wages

§ 76.203 Assignment for Collection

[1] Comment

[a] Use of Form

[b] Validity of Assignments for Collection

[2] FORM

Assignment for Collection

§ 76.204 Assignment of Accounts Receivable

[1] Comment--Use of Form

[2] FORM

Assignment of Accounts Receivable

§ 76.205 Partial Assignment

[1] Comment

[a] Use of Form

[b] Consent Requirement

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[2] FORM

Partial Assignment

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§ 76.210 Consent to Assignment

[1] Comment

[a] Use of Form

[b] Requirement of Consent

[2] FORM

Consent to Assignment

§ 76.211 General Notice of Assignment

[1] Comment

[a] Use of Form

[b] Effect of Notice

[2] FORM

General Notice of Assignment

§ 76.212 Notice of Assignment--Contract for Dance Studio Lessons or Health Studio Services

[1] Comment

[a] Use of Form

[b] Purpose of Notice Requirement

[c] Notice Requirements

[2] FORM

Notice of Assignment--Contract for Dance Studio Lessons or Health Studio Services



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27-76 California Legal Forms--Transaction Guide Scope

Scope

Scope

This chapter covers basic assignments of rights and obligations. It discusses various types of assignments and includes forms illustrating several of the more common assignments. Assignments are contractual in nature and therefore must comply with general contract requirements; for discussion, see Ch. 75, *Formation of Contracts and Standard Contractual Provisions*.

Other chapters in this set cover assignments in particular contexts:

- For discussion and forms for assignments for the benefit of creditors, see Ch. 78, *Creditors' Agreements: Nonbankruptcy Alternatives*.
- For discussion and assignment provisions for use in leases of real property, see Ch. 34A, *Prelease Forms*, Ch. 34B, *Residential Leases*, Ch. 34C, *Commercial, Industrial, and Office Leases*, and Ch. 34D, *Ground Leases*.
- For discussion and forms for assignments of leasehold interests in real property, see Ch. 35A, *Assignment and Sublease of Leasehold Interests*, and Ch. 35B, *Modification and Termination of Leases*.
- For discussion and forms for assignments of interests in oil and gas rights and royalties, see Ch. 36, *Oil and Gas Rights and Leases*.
- For discussion of assignment issues involving secured transactions under Division 9 of the Commercial Code [*Com. Code* § 9101 *et seq.*], see Ch. 42, *Secured Transactions*.
- For discussion and forms for assignments of accounts receivable for the purpose of financing, see Ch. 44, *Accounts Receivable Financing and Factoring*.
- For discussion and forms for assignments of security instruments used in sales of consumer goods, see Ch. 45, *Consumer Installment Loans and Credit Sales*.

■ For discussion of assignments under Division 2 of the Commercial Code [*Com. Code § 2101 et seq.*], see Ch. 52, *Sales of Goods Under the Uniform Commercial Code* .

■ For discussion and forms for assignments used in personal property leasing, see Ch. 53, *Personal Property Leasing* .



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§ 76.01 California Statutes

[1] Assignments Generally

Thing (chose) in action. *Civ. Code § 953.*

Transfer of right represented by judgment. *Civ. Code § 954.5.*

Transfer of nonnegotiable instrument. *Civ. Code § 955.*

Transfer of general intangibles. *Civ. Code § 955.1.*

Transfer of rights to original works of authorship. *Civ. Code § 982.*

Transfers in general. *Civ. Code § 1039 et seq.*

Oral and written transfers. *Civ. Code § 1052.*

Obligation. *Code Civ. Proc. § 26.*

Partner's limitations on assignment of partnership property. *Corp. Code § 16302.*

[2] Particular Circumstances

[a] Consumer Contracts

Liability of retail installment seller's assignee. *Civ. Code § 1804.2.*

Assignment of contract for commercial dance studio lessons and other services. *Civ. Code § 1812.56.*

Assignment of contract for health studio services. *Civ. Code § 1812.88.*

Assignment of contract for discount buying services. *Civ. Code § 1812.114.*

Rights of assignee of a seller assisted marketing plan contract. *Civ. Code § 1812.211.*

[b] Employment

Assignment of wages resulting from orders for child or spousal support. *Fam. Code § 5200 et seq.*

Assignments of wages or salary. *Lab. Code § 300.*

Employment contract provision requiring assignment of patent. *Lab. Code § 2870.*

Nonassignability of workers' compensation claims. *Lab. Code § 4900.*

Nonassignability of unemployment benefits. *Unemp. Ins. Code § 1342.*

[c] Security Transactions

Recording assignment of mortgage. *Civ. Code § 2934.*

Assignment of debt secured by mortgage. *Civ. Code § 2936.*

Assignments as security. *Com. Code §§ 9105, 9107, 9109, 9209, 9309, 9403, 9405-9409, 9514.*

Legal Topics:

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

Contracts LawNegotiable InstrumentsEnforcementDuties & Liabilities of PartiesTypes of PartiesAssignees & AssignorsContracts LawPerformanceGeneral OverviewContracts LawPerformanceAssignmentGeneral Overview



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§ 76.02 Federal Statutes

Assignment of claims against federal government. *31 U.S.C. § 3727.*

Assignment of patents. *35 U.S.C. § 261.*

Limited assignment of federal contracts. *41 U.S.C. § 15.*

Legal Topics:

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

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[Reserved]

§§ 76.03[Reserved]



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§ 76.05 Annotations

Annot., Applicability of Article 9 of Uniform Commercial Code to Assignment of Rights Under Real Estate Sales Contract, Lease Agreement, or Mortgage as Collateral for Separate Transaction, 76 A.L.R.4th 765 (1990).

Annot., Agency: Anti-Assignment Clause in Contract as Precluding Enforcement by Undisclosed Principal, 75 A.L.R.3d 1184 (1977).

Annot., Validity, in Contract for Installment Sale of Consumer Goods, or Commercial Paper Given in Connection Therewith, of Provision Waiving, as Against Assignee, Defenses Good Against Seller, 39 A.L.R.3d 518 (1971).

Annot., Prospective Assignment of Renewal Rights in Copyright, 2 A.L.R.3d 1403 (1965).

Annot., Law Governing Assignment of Wages or Salary, 1 A.L.R.3d 927 (1965).

Annot., Assignability of Statutory Claim Against Employer for Nonpayment of Wages, 48 A.L.R.2d 1385 (1956).

Annot., Validity of Anti-Assignment Clause in Contract, 37 A.L.R.2d 1251 (1954).

Annot., Assignability of Warranty of Goods and Chattels, 17 A.L.R.2d 1196 (1951).

Annot., Transfers or Assignments Within Federal Anti-Assignment Statutes, 12 A.L.R.2d 460 (1950).

Annot., Constitutionality, Construction, and Application of Statute Respecting Sale, Assignment, or Transfer of Retail Installment Contracts, 10 A.L.R.2d 447 (1950).

Legal Topics:

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

Contracts LawNegotiable InstrumentsEnforcementDuties & Liabilities of PartiesTypes of PartiesAssignees & AssignorsContracts LawPerformanceAssignmentGeneral OverviewContracts LawSecured TransactionsThird Party RightsAssignments



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§ 76.06 Text References

[1] Matthew Bender Sources

California Legal Forms (Matthew Bender).

Ch. 22, *Options to Purchase Real Property* .

Ch. 35A, *Assignment and Sublease of Leasehold Interests* .

Ch. 36, *Oil and Gas Rights and Leases* .

Ch. 36A, *Mining Claims, Timber Interests, and Water Rights* .

Ch. 42, *Secured Transactions* .

Ch. 48, *Agricultural Financing* .

Ch. 52, *Sales of Goods Under the Uniform Commercial Code* .

Ch. 55, *Negotiable Instruments* .

Ch. 75, *Formation of Contracts and Standard Contractual Provisions* .

Ch. 78, *Creditors' Agreements: Nonbankruptcy Alternatives* .

Ch. 85, *Employment Agreements* .

Ch. 92, *Service Contracts* .

Ch. 100B, *Contracts and Employment of Minors* .

Ch. 102A, *Personal Property Liens* .

Ch. 103A, *Copyrights* .

California Forms of Pleading and Practice (Matthew Bender).

Ch. 60, *Assignments* .

Ch. 250, *Employment Law: Wage and Hour Disputes* .

Gilson on Trademarks (Matthew Bender).

Ch. 1, *General Principles*.

Ch. 3, *Establishing Trademark Rights*.

Ch. 4, *Federal Trademark Registrations*.

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Warren's Forms of Agreements (Matthew Bender).

Ch. 84, *Assignment and Assumption Agreements* .

Ch. 93, *Assignments* .

[2] Other Text References

Witkin, Summary of California Law, vol. 1, *Contracts*, §§ 707-740; vol. 2, *Insurance* § 74 (10th ed. 2005).

Legal Topics:

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

Contracts Law Performance Assignment General Overview Contracts Law Secured Transactions Third Party Rights Assignments Real Property Law Purchase & Sale Contracts of Sale General Overview



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§ 76.10 Governing Law

Although assignments are permitted by statute [*see Civ. Code §§ 1044, 1045*], much of the law regulating the use of assignments has evolved under case law. Certain transactions, however, are regulated by specific statutory provisions [*see, e.g., Civ. Code §§ 1812.56, 1812.88* (assignments of contracts for specific personal services)], including assignments of wages [*see Lab. Code § 300*] and assignments as security interests [*see Com. Code § 9109(a)*].

Legal Topics:

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

Contracts LawNegotiable InstrumentsEnforcementDuties & Liabilities of PartiesTypes of PartiesAssignees & AssignorsContracts LawPerformanceAssignmentGeneral OverviewContracts LawSecured TransactionsThird Party RightsAssignments



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§ 76.11 Assignment of Rights and Delegation of Duties

Distinguishing between an assignment of rights and a delegation of duties is essential to understanding assignments. An assignment of rights is the transfer of an expected interest (such as a contract benefit) or right [see § 76.12[3]], from the party to whom the interest is due, to a third party. A delegation of duties results in a third party's assumption of a party's obligation [see § 76.12[2]] to another. Under an assignment of rights, the assignee is the obligee of the expected interest. Under a delegation of duties, the assignee is the obligor.

An assignment of rights normally may be made without the consent of the nonassigning party [see *Civ. Code* § 1458]. A delegation of duties, however, usually requires the consent of the party to whom the duty is owed [see *Civ. Code* § 1457; § 76.13[4]].

Legal Topics:

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

Contracts LawNegotiable InstrumentsEnforcementDuties & Liabilities of PartiesTypes of PartiesAssignees & AssignorsContracts LawPerformanceAssignmentGeneral OverviewContracts LawSecured TransactionsThird Party RightsAssignments



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§ 76.12 Definitions

[1] Assignment

An assignment is a transfer of title to any kind of property [*Hudson Properties Co. v. Governing Board* (1985) 168 Cal. App. 3d 63, 72, 213 Cal. Rptr. 909 ; see Civ. Code § 1039 (transfer)]. Generally, however, assignments are used to transfer "choses in action" (things in action) or rights in or connected with property, rather than property itself [see *Estate of Beffa* (1921) 54 Cal. App. 186, 189, 201 P. 616 ; see Civ. Code § 953 ("things in action" defined)].

[2] Obligation

An obligation is a legal duty that binds a person to do or refrain from doing a certain thing [Civ. Code § 1427; Code Civ. Proc. § 26]. An obligation may arise from a contract between parties or by operation of law [Civ. Code § 1428; Code Civ. Proc. § 26]. Obligations arising from operation of law may be enforced by civil action or in the manner specified by law [Civ. Code § 1428; see Code Civ. Proc. § 25].

If an obligation is imposed on more than one person, it may be joint, several, or joint and several [Civ. Code § 1430]. However, it is generally presumed to be joint rather than several unless there are express words to the contrary [see Civ. Code § 1431; but see Civ. Code §§ 1431.2, 1659, 1660 (several liability for noneconomic damages; joint and several liability under contracts)]. Before a party to an obligation can require another party to perform any act under that obligation, the first party must fulfill all conditions precedent imposed on him or her. Further, the first party must be able and must offer to fulfill all conditions concurrent on his or her part, along with the other party's fulfillment of his or her conditions [Civ. Code § 1439].

Certain types of contract obligations are not subject to assignment because of the personal nature of the obligation [see § 76.200[1][c]].

[3] Right

A right, as the term used in this chapter, is the interest held by a person who is owed an obligation [see [2], above]. Such an interest may include the right to payment of wages owed, the right to recover money owed, or the right to

demand performance under a contract. A right arising out of an obligation is the property of the person to whom it is owed, and it may be transferred [*Civ. Code* § 1458].

Legal Topics:

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

Contracts LawPerformanceAssignmentGeneral Overview



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§ 76.13 Requirements for Valid Assignment

[1] Form

An assignment need not be in any particular form. To be effective, an assignment must be a manifestation to another person, by the owner of the right or obligation, of an intention to transfer, without further action or manifestation of intention, that right or obligation, to the other person [*Cockerell v. Title Ins. & Trust Co. (1954) 42 Cal. 2d 284, 291, 267 P.2d 16*]. Oral assignments are enforceable unless a writing can be required under a statute [see *Civ. Code § 1052; Lab. Code § 300* (writing required for assignment of wages)]. In any case, a writing will normally preclude many disputes concerning the subject matter and extent of the assignment [see *Berg Metals Corp. v. Wilson (1959) 170 Cal. App. 2d 559, 575, 339 P.2d 869*].

In determining whether a valid assignment has been made, a court generally will look to the substance of the assignment and not its form [*Bergin v. Van der Steen (1951) 107 Cal. App. 2d 8, 16, 236 P.2d 613* ; see *Recorded Picture Co. v. Nelson Entertainment (1997) 53 Cal. App. 4th 350, 362-363, 61 Cal. Rptr. 2d 742* (subdistributor of motion picture was licensee, not assignee, of distributor, when rights transferred were less than totality of work)]. However, the court may go outside the terms of the instrument and find an assignment from the conduct of the parties [*California Pac. Title Co. v. Moore (1964) 229 Cal. App. 2d 114, 117, 40 Cal. Rptr. 61*].

A court will look at a number of determining factors to uphold the validity of an assignment. These factors include whether the intention of the person making the assignment is ascertainable and whether the instrument is actually delivered [see *Anglo California Nat. Bank v. Kidd (1943) 58 Cal. App. 2d 651, 655, 656, 137 P.2d 460* ; see also [3], below]. Further, a court will look at the assignment to determine whether its subject matter is described with sufficient detail and accuracy [see *Binford v. Boyd (1918) 178 Cal. 458, 464, 174 P. 56* ; *Jauman v. McCusick (1913) 166 Cal. 517, 523, 137 P. 254*].

[2] Consideration

Generally, consideration is not required for a valid assignment enforceable at law [see *Burkett v. Doty (1917) 176 Cal. 89, 92, 167 P. 518* ; see *Civ. Code § 1040* (voluntary transfer, as executed contract, does not require consideration)]. However, if the assignment is incomplete, executory, or otherwise enforceable only as an equitable assignment, a fair

and adequate consideration is required [*Fidelity Sav. etc. Assn. v. Rodgers* (1919) 180 Cal. 683, 686-687, 182 P. 426] .

When consideration is required, a written assignment is presumptive evidence that consideration has been given [Civ. Code § 1614]. The consideration must be equal to that required for the formation of a contract [*Bank of California v. Connolly* (1973) 36 Cal. App. 3d 350, 367, 111 Cal. Rptr. 468] . The consideration does not have to be received by the assignor nor come from the assignee [see *First Nat. Bank v. Pomona Tile Mfg. Co.* (1947) 82 Cal. App. 2d 592, 603, 186 P.2d 693] .

For further discussion of the requirement for consideration for contracts, see Ch. 75, *Formation of Contracts and Standard Contractual Provisions* .

[3] Delivery

A transfer in writing takes effect (that is, the transferred interest vests) only on delivery by the transferor [Civ. Code § 1054]. This requirement for delivery applies to assignments [see *Burkett v. Doty* (1917) 176 Cal. 89, 92, 93, 167 P. 518] . An assignment need not be personally delivered to the assignee; a constructive delivery of a written document evidencing the right of the assignee with the intention of passing title may be sufficient to pass title [*General Motors Acceptance Corp. v. Gilbert* (1961) 196 Cal. App. 2d 732, 739, 17 Cal Rptr. 35] . Further, constructive delivery occurs if either (1) the writing is understood to be delivered at the time of execution and, under those circumstances, the transferee is entitled to immediate delivery or (2) the writing is delivered to a third party for the benefit of the transferee, and the transferee's assent is shown or may be presumed [Civ. Code § 1059].

An assignment is not effective without acceptance by the assignee. However, the assignee's acceptance may be presumed if the assignment is to the benefit of the assignee and no contrary intention appears [*De Levillain v. Evans* (1870) 39 Cal. 120, 122-123] .

[4] Consent and Notice

Generally, a person may not delegate a duty to a third party without the consent of the party to whom the duty is owed [Civ. Code § 1457; see Civ. Code § 1466 (exception for running covenants)]. In contrast, a person may assign rights without the consent of the party owing the benefit unless consent is required by contract or statute [*La Rue v. Groezinger* (1890) 84 Cal. 281, 289, 24 P. 42 ; see, e.g., Lab. Code § 300(b) (spousal consent required for assignment of wages)], or unless the assignment is a partial assignment of a contract, claim, or cause of action [see *Grain v. Aldrich* (1869) 38 Cal. 514, 519] . For further discussion of consent requirements and a form for providing consent, see § 76.210.

In the absence of a statutory or contractual requirement to the contrary, notice of an assignment of rights need not be given to third parties, to create a valid assignment [*Smith v. Harris* (1954) 127 Cal. App. 2d 311, 316, 273 P.2d 835] . However, when an assignment of a contract or chose in action is made, notice to the obligor will protect the interests of the assignee in two ways; and if the assignment is of an interest in real property, recordation of the assignment is sufficient for this purpose [*Central Construction Co. v. Hartman* (1935) 7 Cal. App. 2d 703, 708, 47 P.2d 484] .

- First, the obligor or debtor is entitled to all set-offs and defenses that he or she has or may acquire against the assignor, until the obligor or debtor receives notice of the assignment [*C.I.T. Corporation v. Glennan* (1934) 137 Cal. App. 636, 638-639, 31 P.2d 430 ; see Civ. Code §§ 1812.56, 1812.88 (health and dance studio contracts); see also § 76.212[1]].

- Second, the obligor or debtor on the underlying contract is not bound to perform under the terms of the assignment, until he or she receives notice of the assignment [*Loveland v. Peters* (1949) 92 Cal.

App. 2d 47, 51, 206 P.2d 443] .

For further discussion of notice requirements and forms for providing notice, see §§ 76.211 and 76.212.

Legal Topics:

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

Contracts LawPerformanceAssignmentGeneral Overview



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§ 76.14 Rights and Liabilities of Assignees

[1] In General

Generally, an assignee of a contract or chose (thing) in action [see *Civ. Code* § 953 (definition)] takes his or her interest subject to all equities and defenses available to the obligor that existed at or before notice of the assignment [see *Civ. Code* § 1459; *Code Civ. Proc.* § 368]. The assignee is deemed to stand in the shoes of the assignor [*Berrington v. Williams* (1966) 244 Cal. App. 2d 130, 135-136, 52 Cal. Rptr. 772 ; see *Johnson v. County of Fresno* (2003) 111 Cal. App. 4th 1087, 1096, 4 Cal. Rptr. 3d 475 (employee's assignment of right to pursue indemnification from employer for stipulated judgment)]. If, however, the assignment is of rights under an executory and bilateral contract, the obligor may raise an appropriate defense in the event the assignor breaches the contract. This is true even if the breach occurs after the obligor has received notice of the assignment [see *Bliss v. California Cooperative Producers* (1947) 30 Cal. 2d 240, 250, 181 P.2d 369] . Additionally, the assignee of amounts due or owed to the assignor on performance under an executory contract takes that amount subject to advances made by the obligor, enabling the assignor to perform [see *Fricker v. Uddo & Taormina Co.* (1957) 48 Cal. 2d 696, 701, 312 P.2d 1085] .

An assignee acquires all rights under and incidental to the contract or action assigned [*Civ. Code* § 1084], including the following:

- Collateral securities or liens [see *Civ. Code* § 2936; *Marx v. McKinney* (1943) 23 Cal. 2d 439, 144 P.2d 353 ; *Mitchell v. Shoreridge Oil Co.* (1938) 24 Cal. App. 2d 382, 384, 75 P.2d 110 , *overruled on other grounds*, *George F. Kennedy, Inc. v. Miles and Sons Constr. Division* (1970) 5 Cal. App. 3d 516, 522, 85 Cal. Rptr. 298] .
- The right to rescind a contract on breach by the other party and recover money expended by the assignee or assignor [*National Pacific Oil Co. v. Watson* (1920) 184 Cal. 216, 220, 221 ; *Latimer v. Capay Valley Land Co.* (1902) 137 Cal. 286, 290, 70 P. 82] .
- An option to purchase real property when included in a lease [*Bewick v. Mecham* (1945) 26 Cal. 2d 92, 96, 156 P.2d 757 ; see Ch. 35A, *Assignment and Sublease of Leasehold Interests*].

- The underlying assigned debt, even if a judgment on that debt is later overturned [*North v. Evans* (1934) 1 Cal. App. 2d 64, 67, 36 P.2d 133] .
- The right to recover attorneys' fees in an action arising out of a settlement agreement to which the assignee was not a party [*A.J. Industries, Inc. v. Ver Halen* (1977) 75 Cal. App. 3d 751, 762, 142 Cal. Rptr. 383] .

An assignee of rights under a contract does not become bound to perform the obligations of the assignor by a mere acceptance of the assignment [*Griffin v. Williamson* (1955) 137 Cal. App. 2d 308, 315, 290 P.2d 361] . In order to hold the assignee liable for the obligations arising under the contract, there must be an express assumption of those obligations [*Bruce v. Mier* (1932) 120 Cal. App. 287, 290, 7 P.2d 1037 ; see also *Foreman Roofing Inc. v. United Union of Roofers etc. Workers* (1983) 144 Cal. App. 3d 99, 107, 192 Cal. Rptr. 439] , and the obligee must consent to the assignee's assumption [Civ. Code § 1457; see § 76.13[4]]. On assumption of the assignor's obligations under a contract, the assignee may become liable to the assignor for any loss incurred by the assignor as a result of the assignee's failure to perform those obligations [see *Cutting Packing Co. v. Packers' Exchange of California* (1890) 86 Cal. 574, 579, 25 P. 52] .

[2] Contracts for Specific Consumer Services

On assignment of a contract for dance studio lessons [see generally Civ. Code § 1812.50 et seq.] or health studio services [see generally Civ. Code § 1812.80 et seq.], the assignee must provide notice to the buyer of the assignment. In addition, the assignee must inform the buyer of those services of the necessity to provide a written account of any claims and defenses arising from the contract within 30 days of the mailing of the notice, in order to preserve those claims and defenses [see Civ. Code §§ 1812.56, 1812.88; § 76.212].

The assignment of a contract for discount buying services [see generally Civ. Code § 1812.100 et seq.] to a third party does not cut off any right of action or defense, arising out of the contract, that the buyer has against the discount buying organization [Civ. Code § 1812.114].

Any assignee of a seller assisted marketing plan contract [see generally Civ. Code § 1812.200 et seq.] or of the seller's rights in the contract is subject to all equities, rights, and defenses of the purchaser against the seller [Civ. Code § 1812.211].

An assignee of a life insurance policy has a contractual right to notice, from the insurer, of a prospective lapse of the policy and a right to reinstatement of the policy [*Estate of Coate* (1979) 98 Cal. App. 3d 982, 988, 159 Cal. Rptr. 794 ; see California Insurance Law and Practice, Ch. 8, *The Insurance Contract* (Matthew Bender)].

[3] Priorities Among Assignees

In the event that an assignor makes multiple assignments of the same chose (thing) in action, the priority of the successive assignees must be established. California courts have adopted the notice rule, which gives the highest priority to the assignee who first serves notice of the assignment [see *First Nat. Bank v. Pomona Tile Mfg. Co.* (1947) 82 Cal. App. 2d 592, 605, 186 P.2d 693 ; § 76.211].

Legal Topics:

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

Contracts LawNegotiable InstrumentsEnforcementDuties & Liabilities of PartiesTypes of PartiesAssignees & AssignorsContracts LawPerformanceAssignmentGeneral OverviewContracts LawSecured TransactionsThird Party

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27-76 California Legal Forms--Transaction Guide § 76.15

§ 76.15 Liabilities of Assignor

Generally, the burden of an obligation may be transferred with the consent of the party entitled to its benefit (the obligee) [Civ. Code § 1457; see § 76.13[4]]. The assignor (obligor) is relieved of liability to the obligee if the obligee consents to the assignment [see *Wiseman v. Sklar* (1930) 104 Cal. App. 369, 374, 285 P. 1081]. However, if the obligee has not consented to the assignment, the assignor remains liable to the obligee for the performance of the obligation. Even if the assignee has expressly assumed the obligations of the underlying agreement, the assignor remains secondarily liable as a surety or guarantor of the assignee's performance [see *Walker v. Phillips* (1962) 205 Cal. App. 2d 26, 33, 22 Cal. Rptr. 727].

An assignor also incurs the additional liability of an implied warranty of the genuineness, title, and validity of the subject matter of the assignment [see *Mary Pickford Co. v. Bayly Bros., Inc.* (1939) 12 Cal. 2d 501, 518, 86 P.2d 102]. For a sample form provision covering the assignor's warranty and representation of the validity of the subject matter underlying the assignment, see § 76.204[2].

Legal Topics:

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

Contracts LawNegotiable InstrumentsEnforcementDuties & Liabilities of PartiesTypes of PartiesAssignees & AssignorsContracts LawPerformanceAssignmentGeneral OverviewContracts LawSecured TransactionsThird Party RightsAssignments



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DIVISION V: CONTRACTS AND OBLIGATIONS
CHAPTER 76 ASSIGNMENTS OF RIGHTS AND OBLIGATIONS
PART II. LEGAL BACKGROUND

27-76 California Legal Forms--Transaction Guide §§ 76.16-76.99

[Reserved]

§§ 76.16[Reserved]



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CHAPTER 76 ASSIGNMENTS OF RIGHTS AND OBLIGATIONS
PART III. TRANSACTION GUIDE
A. Client Interview--Facts and Documents

27-76 California Legal Forms--Transaction Guide § 76.100

§ 76.100 Facts

1. Identity of assignor and assignee.

a. Full name, address, and telephone number.

b. Legal status of assignor and assignee.

(1) Individual.

(a) Marital status.

(b) Age.

NOTE:

Generally, a person must be at least 18 years old to enter into an enforceable agreement [*see Civ. Code §§ 1556, 1557; Fam. Code § 6500, see also Ch. 100B, **Contracts and Employment of Minors***].

(2) Partnership.

(3) Corporation.

2. Name, address, and telephone number of spouse.

NOTE:

To assign wages [*see* § 76.202], a married person must obtain the written consent of his or her spouse [*Lab. Code § 300(b)(2)*].

3. If assignor is minor: name, address, and telephone number of parent or guardian.

NOTE:

An assignment of wages [**see** § 76.202] for a minor requires the written consent of a parent or guardian [*Lab. Code* § 300(b)(3)].

4. Name, address, and telephone number of any other interested person, such as:

- a. Obligor, for assignment of contract [*see* § 76.200].
- b. Debtor, for assignment of account [*see* §§ 76.203, 76.204].
- c. Employer, for assignment of wages [*see* § 76.202].
- d. Defendant, for assignment of cause of action [*see* § 76.201].

5. Name, address, and telephone number of counsel representing party.

6. Nature of obligation or right to be assigned, such as:

- a. Contract [*see* § 76.200].
- b. Cause of action [*see* § 76.201].
- c. Wages [*see* § 76.202].
- d. Overdue account for collection [*see* § 76.203].
- e. Money due under accounts receivable [*see* § 76.204].

Legal Topics:

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

Contracts LawNegotiable InstrumentsEnforcementDuties & Liabilities of PartiesTypes of PartiesAssignees & AssignorsContracts LawPerformanceAssignmentGeneral OverviewContracts LawSecured TransactionsThird Party RightsAssignments



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A. Client Interview--Facts and Documents

27-76 California Legal Forms--Transaction Guide § 76.101

§ 76.101 Documents

1. Copy of underlying contract.
2. Related or supplemental documents, including modifications and alterations of underlying contract.
3. Other relevant documents, such as:
 - a. Correspondence.
 - b. Filings and results of discovery, for assignment of cause of action.

Legal Topics:

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

Contracts LawContract Conditions & ProvisionsGeneral OverviewContracts LawPerformanceAssignmentGeneral Overview



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DIVISION V: CONTRACTS AND OBLIGATIONS
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A. Client Interview--Facts and Documents

27-76 California Legal Forms--Transaction Guide §§ 76.102-76.109

[Reserved]

§§ 76.102[Reserved]



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DIVISION V: CONTRACTS AND OBLIGATIONS
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PART III. TRANSACTION GUIDE
B. Preliminary Determinations

27-76 California Legal Forms--Transaction Guide § 76.110

§ 76.110 Type of Assignment to Be Drafted

1. Which of following types of assignment will be drafted?

- a. Assignment of contract [*see* § 76.200].
- b. Assignment of cause of action [*see* § 76.201].
- c. Assignment of wages [*see* § 76.202].
- d. Assignment of debt for collection [*see* § 76.203].
- e. Assignment of money due or to become due under accounts receivable [*see* § 76.204].

2. Will partial assignment be drafted [*see* § 76.205]?

NOTE:

Consent, which is not usually required for assignments of causes of action or claims for money, is required if a partial assignment of either of these is made [*see Grain v. Aldrich (1869) 38 Cal. 514, 519*]. For discussion and a form for consent, see § 76.205.

Legal Topics:

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

Contracts LawContract Conditions & ProvisionsGeneral OverviewContracts LawPerformanceAssignmentGeneral Overview



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B. Preliminary Determinations

27-76 California Legal Forms--Transaction Guide § 76.111

§ 76.111 Assignability Issues

1. Does contract underlying assignment contain provision prohibiting assignment?

NOTE:

Certain assignments will be allowed even if a contract bars assignment [*see* § 76.200[1][d]].

2. Does underlying contract require purely personal performance of promisor?

NOTE:

Contract duties calling for the skill, credit, or some other personal quality of a promisor generally may not be assigned [*Coykendall v. Jackson* (1936) 17 Cal. App. 2d 729, 731, 62 P.2d 746 ; *see* § 76.200[1][c]].

3. Do parties contemplate assignment of tort cause of action?

- a. Does cause of action arise from damage to property?

NOTE:

Such a cause of action normally is assignable [*see* Civ. Code § 954].

- b. Is cause of action one of following torts of personal nature?

- (1) Slander.

- (2) Assault and battery.

(3) Negligent personal injuries.

(4) Criminal conversation.

(5) Seduction.

(6) Breach of marriage promise.

(7) Malicious prosecution.

NOTE:

Torts claims of a personal nature generally may not be assigned [*see Reichert v. General Ins. Co. (1968) 68 Cal. 2d 822, 834, 69 Cal. Rptr. 321, 442 P.2d 377*; *Baum v. Duckor, Spradling & Metzger (1999) 72 Cal. App. 4th 54, 67-69, 84 Cal. Rptr. 2d 703* (cause of action for legal malpractice is not assignable; claim belonging to bankruptcy estate of corporation could not be assigned by trustee of that estate to creditor of corporation for prosecution in state court); *see also* § 76.201[1][c]]. However, tort claims involving both injuries to property and injuries of a personal nature may be assigned to the extent of the property claim [*Cassetta v. Del Frate (1931) 116 Cal. App. 255, 257, 2 P.2d 533*] .

4. Do parties contemplate assignment of future unearned wages?

NOTE:

A person may not assign his or her unearned wages, except for the necessities of life [*see Lab. Code* § 300(h); § 76.202[1]].

Legal Topics:

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

Contracts LawContract Conditions & ProvisionsGeneral OverviewContracts LawPerformanceAssignmentGeneral Overview



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27-76 California Legal Forms--Transaction Guide § 76.112

§ 76.112 Assignments Requiring Consent

1. If wages are subject matter of assignment, is assignor a married person or minor?

NOTE:

If the assignor is a married person or a minor, the consent of the spouse or the minor's parent or guardian is required [*see Lab. Code § 300(b); § 76.202*].

2. Does assignment include delegation of contractual duties?

NOTE:

The burden of an obligation may be transferred only with the consent of the party entitled to its benefit [*Civ. Code § 1457; see § 76.210*].

3. Does assignment include only portion of assignable rights?

NOTE:

Partial assignments of claims and contracts normally require the consent of the debtor or obligor [*see § 76.205[1][b]*].

Legal Topics:

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

Contracts LawContract Conditions & ProvisionsGeneral OverviewContracts LawPerformanceAssignmentGeneral OverviewContracts LawPerformanceAssignmentConsent



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B. Preliminary Determinations

27-76 California Legal Forms--Transaction Guide § 76.113

§ 76.113 Assignments Requiring Notice

1. Are wages being assigned?

NOTE:

A person assigning wages must give notice to his or her employer [*see Lab. Code § 300(b)(6)*].

2. Are contract rights being assigned?

NOTE:

The assignee should give notice of the assignment of a contract to the obligor or debtor under the original contract, to protect two significant interests. First, the obligor or debtor is entitled to all set-offs and defenses that he or she has or may acquire against the assignor, until the obligor or debtor receives notice of the assignment [*C.I.T. Corporation v. Glennan (1934) 137 Cal. App. 636, 638-639, 31 P.2d 430 ; see Civ. Code §§ 1812.56, 1812.88* (health and dance studio contracts); *see also § 76.212[1]*]. Second, the obligor or debtor under the underlying contract is not bound to perform under the terms of the assignment, until he or she receives notice of the assignment [*Loveland v. Peters (1949) 92 Cal. App. 2d 47, 51, 206 P.2d 443 ; see § 76.211[1]*].

3. Is contract for dance studio lessons or health studio services?

NOTE:

A buyer's right of action or defense arising out of a contract for dance studio lessons or health studio services is protected by a notice of assignment in a form prescribed by statute [*see Civ. Code §§ 1812.56, 1812.88; § 76.212*].

4. Is filing of notice advisable because of possibility of multiple assignments?

NOTE:

In the event that an assignor makes multiple assignments of the same chose (thing) in action, the priority of the successive assignees must be established. California courts have adopted the notice rule, which gives the highest priority to the assignee who first serves notice of the assignment [*see First Nat. Bank v. Pomona Tile Mfg. Co. (1947) 82 Cal. App. 2d 592, 605, 186 P.2d 693 ; see also § 76.211*].

5. Does underlying contract require notice of assignment?

Legal Topics:

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

Contracts LawPerformanceGeneral OverviewContracts LawPerformanceAssignmentGeneral Overview



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27-76 California Legal Forms--Transaction Guide §§ 76.114-76.119

[Reserved]

§§ 76.114[Reserved]



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C. Procedural Guide

27-76 California Legal Forms--Transaction Guide § 76.120

§ 76.120 Preparation and Execution of Assignment

1. Draft particular assignment [see §§ 76.200-76.205], including following provisions:

a. Identification of parties.

NOTE:

An assignment of wages [see § 76.202] must also include a statement of the personal status of the parties [see *Lab. Code* § 300(b)(3)].

b. Consideration.

c. Description of right or obligation assigned.

d. For assignment of wages [see § 76.202], include statement that instrument is sole assignment stemming from transaction [see *Lab. Code* § 300(b)(5)].

e. For assignment of account for collection [see § 76.203]:

(1) Descriptions of debtor and debt.

(2) Statement of assignee's authority to collect debt.

(3) Grant of assignee's exclusive right to collect debt.

(4) Authorization for adjustment or compromise of claim.

(5) Assignee's commission.

- (6) Notification to assignee of direct payments by debtor.
- (7) Authorization for assignee to endorse commercial paper made payable to assignor.
- (8) Authorization for assignee to collect interest on debt.
- (9) Assignor's statement of account.
- (10) Provision for withdrawal of claim.

NOTE:

The parties may provide for the manner in which the assignor may withdraw a claim for collection.

f. For assignment of accounts receivable [*see* § 76.204]:

- (1) Identification of account debtors.
- (2) Assignor's representations.

2. Prepare copies of assignment.

NOTE:

In addition to copies for the parties and the attorneys' records, a notarized copy of an assignment of wages and any related attachments must be given to the employer of the assignor [*see Lab. Code* § 300(b)(6)].

3. Have assignor execute assignment.

4. If assignee is assuming any duties of assignor, have assignee execute assignment to indicate acceptance of those duties [*see* § 76.200[1]].

5. For assignment of wages [*see* § 76.202], have assignment authenticated by notary public [*see Lab. Code* § 300(b)(6); *see also Civ. Code* § 1181 (notarial authority)].

Legal Topics:

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

Contracts LawPerformanceGeneral OverviewContracts LawPerformanceAssignmentGeneral Overview



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27-76 California Legal Forms--Transaction Guide § 76.121

§ 76.121 Consent to Assignment

1. Prepare consent to assignment [see §§ 76.202[2] (assignment of wages, consent form incorporated), 76.210[2] (general consent form)], if necessary [see § 76.112].
2. Obtain consent of appropriate person:
 - a. Spouse, for assignment of married person's wages [see *Lab. Code* § 300(b)(2)].
 - b. Parent or guardian, for assignment of minor's wages [see *Lab. Code* § 300(b)(3)].
 - c. Obligee, for delegation of assignor's duties [*Civ. Code* § 1457].
 - d. Following person, for partial assignment [see *Grain v. Aldrich* (1869) 38 Cal. 514, 519 ; § 76.205]:
 - (1) Obligor, for partial assignment of contract rights.
 - (2) Debtor, for partial assignment of account for collection.
 - (3) Defendant, for partial assignment of cause of action.

Legal Topics:

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

Contracts LawPerformanceAssignmentGeneral OverviewContracts LawPerformanceAssignmentConsent



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27-76 California Legal Forms--Transaction Guide § 76.122

§ 76.122 Notice of Assignment

1. Prepare notice of assignment [see §§ 76.211, 76.212], including following information, if necessary [see § 76.113]:

- a. Names and addresses of parties.
- b. Date of assignment.
- c. Description of underlying subject matter.
- d. Directions to party.

NOTE:

For example, the assignee or assignor may inform the debtor or obligor about who is the assignee and what modifications in performance, if any, are to be made under the assignment.

2. Provide notice of assignment to each appropriate party:

- a. Obligor or debtor.
- b. Employer of person assigning his or her wages [see *Lab. Code* § 300(b)(6)].
- c. Buyer of dance studio lessons or health studio services [see *Civ. Code* §§ 1812.56, 1812.88].

Legal Topics:

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

Contracts LawPerformanceGeneral OverviewContracts LawPerformanceAssignmentGeneral Overview



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27-76 California Legal Forms--Transaction Guide §§ 76.123-76.199

[Reserved]

§§ 76.123[Reserved]



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DIVISION V: CONTRACTS AND OBLIGATIONS
CHAPTER 76 ASSIGNMENTS OF RIGHTS AND OBLIGATIONS
PART IV. FORMS
A. Assignments

27-76 California Legal Forms--Transaction Guide § 76.200

§ 76.200 Assignment of Contract

[1] Comment

[a] Use of Form

The form in [2], *below*, may be used for a general assignment of a contract. For a specific assignment of the contractual right to wages, see § 76.202. For a partial assignment of a contract, see § 76.205. Forms for notice and consent are discussed and *set out in* §§ 76.210-76.212.

[b] Validity of Assignment of Contract

California law generally favors the free assignability of things in action and property [*see Civ. Code* §§ 953-955.1, 1044, 1458 (things in action; property of any kind may be transferred; transfer of rights arising out of obligations)]. However, the burden of an obligation may not be transferred without the consent of the party entitled to its benefit [*Civ. Code* § 1457].

The consent requirement does not prevent a third party from assuming the obligations of the contract by means of an assignment, nor does the requirement bar a third party from enforcing the contract once the third party has fully performed [*Anderson v. De Urioste* (1892) 96 Cal. 404, 407, 31 P. 266 ; *Wiseman v. Sklar* (1930) 104 Cal. App. 369, 374, 285 P. 1081] . The Civil Code prevents an assignor from being relieved of a contractual obligation by assignment unless and until the obligee consents [*Civ. Code* § 1457]. For discussion of the applicability of the consent requirement to assignments of contractual obligations, see § 76.210[1].

The form in [2], *below*, contains an optional provision governing the assignee's assumption of duties and obligations contained in the underlying contract. For a discussion of the assignee's and assignor's liabilities under the original contract, see § 76.14.

[c] Contracts Personal in Nature

Contracts that call for the skill, credit, or other personal quality of the promisor are not assignable or survivable [*Coykendall v. Jackson* (1936) 17 Cal. App. 2d 729, 731, 62 P.2d 746] . The determination that an obligation is one of a personal character depends on whether the performance by the assignee would be essentially different from the performance contemplated in the underlying contract [see *La Rue v. Groezinger* (1890) 84 Cal. 281, 285, 24 P. 42] . If only part of the required performance under the contract is of a personal nature, the balance of the contract may be assigned, after the personal part of the obligation has been discharged [*Fenn v. Pickwick Corp.* (1931) 117 Cal. App. 236, 241, 4 P.2d 215] .

[d] Contractual Provisions Barring Assignment

The parties to a contract may provide that it is not assignable [*Thomas v. Thomas* (1961) 192 Cal. App. 2d 771, 780, 13 Cal. Rptr. 872] . Assignability may not be restricted, however, if the restriction would violate a statute [see, e.g., *Ins. Code* § 10130 (assignability of life insurance and disability insurance policies)] or public policy [see, e.g., *Pimentel v. Conselho Supremo, Etc.* (1936) 6 Cal. 2d 182, 190, 57 P.2d 131] . A general prohibition against the assignment of a contract does not bar the assignment of money due or to become due under the contract or of damages for the breach of the contract [*Trubowitch v. Riverbank Canning Co.* (1947) 30 Cal. 2d 335, 339-340, 182 P.2d 182] .

[e] Contracts for Sale of Goods

The Commercial Code governs assignment of rights and delegation of performance under contracts for the sale of goods [see *Com. Code* § 2210; see also Ch. 52, *Sale of Goods Under the Uniform Commercial Code*] . A party may perform a duty through a delegate unless the parties agreed otherwise or unless the other party has a substantial interest in having the original promisor perform or control the acts required by the contract [*Com. Code* § 2210(1); see [c], above].

An assignment of "the contract" or "all my rights under the contract," or an assignment in similar general terms, is an assignment of rights and, unless the language or circumstances indicate otherwise, it is also a delegation of performance of duties of the assignor. The acceptance of the assignment by the assignee constitutes a promise by the assignee to perform those duties. Either the assignor or the other party to the original contract may enforce the assignee's promise to perform [*Com. Code* § 2210(5)].

The other party to the original contract has the right to demand assurances of performance from the assignee [*Com. Code* § 2210(6); see *Com. Code* § 2609(5)]. The receipt of assurances from the assignee does not prejudice the rights of the other party to the original contract against the assignor [*Com. Code* § 2210(6); see *Com. Code* § 2210(1) (delegation of duties does not relieve assignor of liability for any breach)]. For further discussion and examples of forms for assurance, see Ch. 52, *Sales of Goods Under the Uniform Commercial Code* .

Even if a contract for the sale of goods contains a clause barring assignment, rights that are no longer executory, such as the right to damages for the breach of the contract, may be assigned [see *Com. Code* § 2210(2); but see *Com. Code* § 9406 (exceptions)]. Unless the circumstances indicate otherwise, a prohibition of assignment of "the contract" is to be construed as barring only the delegation to the assignee of the assignor's performance [*Com. Code* § 2210(4)].

[2] FORM

Assignment of Contract

Assignment of Contract

For value received, [name of assignor] (Assignor), hereby assigns all of Assignor's right, title, and interest in and to the contract entered into on _____ [date], by and between Assignor and [name of other party to contract] (Contract), to [name of assignee] (Assignee). The subject matter of the Contract is [specify subject matter of contract].

A copy of the Contract is attached to this Assignment.

[Add if appropriate: By this Assignment, Assignor delegates to Assignee all of Assignor's duties and obligations of performance of the Contract. By accepting this Assignment, Assignee agrees to assume and perform all duties and obligations that Assignor has under the Contract, as if Assignee had been an original party to the Contract. Assignee further agrees to indemnify and hold Assignor harmless from any liability for performance or nonperformance of the Contract.]

This Assignment shall be binding on and shall inure to the benefit of the respective heirs, devisees, legatees, executors, administrators, trustees, successors, and assigns of the parties to this Assignment.

This Assignment shall be governed by and construed in accordance with California law.

Executed _____[date] at [place of execution].

ASSIGNOR

_____ [signature]
[typed name of assignor]

[Add if assignee's signature is necessary:]

ASSIGNEE

_____ [signature]
[typed name of assignee]

Legal Topics:

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

Contracts LawContract Conditions & ProvisionsGeneral OverviewContracts LawPerformanceGeneral
OverviewContracts LawPerformanceAssignmentGeneral Overview



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DIVISION V: CONTRACTS AND OBLIGATIONS
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PART IV. FORMS
A. Assignments

27-76 California Legal Forms--Transaction Guide § 76.201

§ 76.201 Assignment of Cause of Action

[1] Comment

[a] Use of Form

The form in [2], below, may be used for an assignment of a cause of action to enforce an obligation or obtain redress or compensation for injury to person or property. Certain causes of action may be partially assigned; for discussion of these and a form for a partial assignment of a cause of action, see § 76.205. For discussion of the litigation aspects of the assignment of a cause of action, see *California Forms of Pleading and Practice*, Ch. 60, *Assignments* (Matthew Bender).

[b] Assignability of Causes of Action

A thing in action arising out of the violation of a right to property or out of an obligation may be transferred by the owner [*Civ. Code* § 954]. A thing in action (also known as a chose in action) is a right to recover money or other personal property by a judicial proceeding [*Civ. Code* § 953].

Generally, all causes of action arising from a contract may be assigned [*see Trubowitch v. Riverbank Canning Co.* (1947) 30 Cal. 2d 335, 339, 340, 182 P.2d 182 ; *but see [c], below*]. These causes of action include:

- An insured's cause of action against the insurer for breach of contract arising from bad faith failure to settle a claim [*Doser v. Middlesex Mutual Ins. Co.* (1980) 101 Cal. App. 3d 883, 890, 162 Cal. Rptr. 115 ; *see California Insurance Law and Practice*, Ch. 8, *The Insurance Contract* (Matthew Bender)].
- The right to recover money paid under a void contract [*Rued v. Cooper* (1893) 109 Cal. 682, 692, 34 P. 98] .
- The right to contest a will [*Estate of Clark* (1928) 94 Cal. App. 453, 460, 271 P. 542 ; *see Estate of Field* (1951) 38 Cal. 2d 151, 153-154, 238 P.2d 578 ; *Estate of Baker* (1915) 170 Cal. 578, 587-587,

150 P. 989] .

[c] Assignability of Tort Claims

Tort claims of a personal nature may not be assigned. However, when reduced to a judgment, any tort claim becomes a debt and may be assigned [*Portillo v. Farmers Ins. Exchange* (1965) 238 Cal. App. 2d 58, 62, 47 Cal. Rptr. 450] . Nonassignable tort claims of a personal nature are those that are founded on wrongs of a purely personal nature, such as slander, assault and battery, negligence causing personal injuries, criminal conversation, seduction, breach of marriage promise, and malicious prosecution.

A cause of action for legal malpractice is not assignable [*Goodley v. Wank & Wank, Inc.* (1976) 62 Cal. App. 3d 389, 398, 133 Cal. Rptr. 83] . This rule applies to any assignment of such a claim, whether voluntary or involuntary [*Kracht v. Perrin, Gartland & Doyle* (1990) 219 Cal. App. 3d 1019, 1022-1024, 268 Cal. Rptr. 637] . Thus, a legal malpractice claim belonging to the bankruptcy estate of a corporation may not be assigned by the trustee to a creditor of the corporation, for prosecution in state court [*Baum v. Duckor, Spradling & Metzger* (1999) 72 Cal. App. 4th 54, 67-69, 84 Cal. Rptr. 2d 703] .

All other demands, claims, and rights of action based on tort are generally held to be assignable [*Reichert v. General Ins. Co.* (1968) 68 Cal. 2d 822, 834, 69 Cal. Rptr. 321, 442 P.2d 377] .

If a cause of action contains claims for both purely personal injuries and injury to property, the cause of action may be assigned to the extent of the property claim [*Cassetta v. Del Frate* (1931) 116 Cal. App. 255, 257, 2 P.2d 533] . For a form for a partial assignment of a cause of action, see § 76.205[2].

[d] Superseded Rights of Assignor

By an absolute assignment, the assignor relinquishes the right to maintain an action on a claim. The assignor's right to demand performance is extinguished, the assignee having acquired the right to maintain the action [*McCown v. Spencer* (1970) 8 Cal. App. 3d 216, 225, 87 Cal. Rptr. 213] . For further discussion of the rights and liabilities of the assignee and assignor, see § 76.14.

[2] FORM

Assignment of Cause of Action

Assignment of Cause of Action

In consideration of [specify consideration], [name of assignor] (Assignor) transfers and assign to [name of assignee] (Assignee) all of Assignor's right, title, and interest in and to a certain cause of action against _____[name of defendant] for [specify nature of cause of action]. The cause of action arose on the following circumstances: [briefly describe].

This assignment is intended to convey to Assignee all of Assignor's right, title, and interest in the assigned cause of action. Additionally, Assignee acquires the full power to prosecute, compromise, settle, reassign, and give a release in full settlement of the cause of action.

This Assignment shall be binding on and shall inure to the benefit of the respective heirs, devisees, legatees, executors, administrators, trustees, successors, and assigns of the parties to this Assignment.

This Assignment shall be governed by and construed in accordance with California law.

Executed on _____[*date*], at [*place of execution*].

ASSIGNOR

_____ [*signature*]

[*typed name of assignor*]

Legal Topics:

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

Contracts LawContract Conditions & ProvisionsGeneral OverviewContracts LawPerformanceGeneral
OverviewContracts LawPerformanceAssignmentGeneral Overview



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DIVISION V: CONTRACTS AND OBLIGATIONS
CHAPTER 76 ASSIGNMENTS OF RIGHTS AND OBLIGATIONS
PART IV. FORMS
A. Assignments

27-76 California Legal Forms--Transaction Guide § 76.202

§ 76.202 Assignment of Wages

[1] Comment

[a] Use of Form

The form in [2], *below*, may be used for an assignment of wages, whether earned or to be earned. It complies with the statutory requirements for an assignment of wages [*see Lab. Code § 300; [d], below*]. It should not be used if the assignment of wages has been ordered to ensure child, spousal, or conservatee support payments [*Lab. Code § 300(a)*]; wage assignments for those purposes are made on forms prescribed by the Judicial Council [*see Fam. Code § 5295; Prob. Code § 3088(e)*]. For further discussion of wage assignments for support of conservatees, see Ch. 66A, *Conservatorships*.

[b] Assignment of Wages--In General

Wages earned in an existing employment relationship are assignable [*Walker v. Rich (1926) 79 Cal. App. 139, 144, 249 P. 56* ; *see Civ. Code § 1044; [c], below*]. It is immaterial if (1) the employment is day-to-day, and the employee is hired for no specified time, or (2) the employee works by the piece, and the wages vary, or (3) the employment is terminable at any time [*Walker v. Rich (1926) 79 Cal. App. 139, 144, 249 P. 56*] .

An assignment of wages may not be made for an amount exceeding half of the wages owed and payable to the assignor for any period [*Lab. Code § 300(c)*]. An assignment of wages may not be made if the assignment relates to a transaction or series of transactions for which the assignor has made a previous assignment of wages [*Lab. Code § 300(b)(5)*]. No assignment of wages under *Lab. Code § 300* is valid if any other assignment of wages or earnings withholding order is payable from the employee's wages [*Lab. Code § 300(b)(7)*; *see, e.g., Code Civ. Proc. § 706.010 et seq. (Wage Garnishment Law)*].

A copy of the completed assignment and the required statements [*see Lab. Code § 300(b)(2), (4), (5); [d], below*] must be notarized and filed with the employer [*Lab. Code § 300(b)(6)*].

Assignments of wages are prohibited if the employee is paid out of a central fund established by several employers pursuant to *Lab. Code § 204a* [*Lab. Code § 300(f)*]. The limitations placed on wage assignments and the formalities required are not applicable to assignments made by independent contractors [*Fitch v. Pacific Fid. Life Ins. Co.* (1975) 54 Cal. App. 3d 140, 146, 126 Cal. Rptr. 445] . For further discussion of the distinction between employees and independent contractors, see Ch. 84, *Independent Contractors* .

[c] Future Earnings

Wages not yet earned may not be assigned unless the assignment is made for necessities of life. An assignment of future earnings must be made directly to the person providing the necessities and only for the amount needed to pay those necessities [*Lab. Code § 300(h)*]. An assignment of future earnings may be revoked at any time by the assignor; however, as against an employer, the revocation is not valid until the employer has received written notice of the revocation from the assignor [*Lab. Code § 300(e)*].

[d] Provisions Required by Statute

Assignments of wages must comply with certain statutory requirements to be valid [*see Lab. Code § 300(b)*]. The assignment must be contained in a separate written instrument signed by the person earning the assigned wages and specifically identifying the transaction to which the assignment relates [*Lab. Code § 300(b)(1)*].

If the assignor is married or is a minor, the written consent of the assignor's spouse, or the minor's parent or guardian, must be attached to the assignment [*Lab. Code § 300(b)(2), (3)*]. A married assignor is excused from the consent requirement if the married assignor is living separate and apart from his or her spouse after entry of an interlocutory judgment of dissolution of their marriage, and the assignor includes or attaches a statement describing this fact in the assignment, or if a judgment decreeing a legal separation has been entered [*Lab. Code § 300(b)(2)*].

If the assignor is an unmarried adult, a statement to that effect must be included in or attached to the assignment [*see Lab. Code § 300(b)(4)*].

The assignment must include, or have attached, a statement that the assignor has made no other assignment of wages involving the same transaction [*Lab. Code § 300(b)(5)*]. The assignment must also be accompanied by an itemized statement of the amount of wages then due to the assignee [*Lab. Code § 300(b)(6)*].

[e] Formalities Applicable to Minors

A minor may not make a contract relating to any personal property not within his or her immediate possession or control [*Fam. Code § 6701(c)*]. An assignment of wages to be earned by a minor has been ruled void as a contract involving personal property not within the minor's immediate possession or control [*Morgan v. Morgan* (1963) 220 Cal. App. 2d 665, 675, 34 Cal. Rptr. 82] . Applying this ruling, it might seem appropriate for the parent or guardian of the minor to execute the actual assignment [*see Fam. Code § 7500* (parents are entitled to earnings of their minor children)]. The Labor Code, however, sets out the requirements for a wage assignment by a minor, indicating that a minor may execute a valid assignment of wages, as long as a parent or guardian consents [*Lab. Code § 300(b)(3)*; *see [d], above*].

A minor who is married or otherwise emancipated [*see Fam. Code § 7002*] is exempt from the requirement of parental consent for an assignment of wages [*Fam. Code § 7050(d)(3)*]. However, a married minor must still comply with the requirement for spousal consent [*Lab. Code § 300(b)(2)*; *see Fam. Code § 7002(a)*; *see also [d], above*].

For further discussion of the laws regulating employment of minors, see Ch. 100B, *Contracts and Employment of Minors* .

[f] Employer's Role in Assignment

The employer of the person making an assignment of wages must receive a notarized copy of (1) the assignment, (2) any spousal consent, (3) the statement of age and marital status, and (4) the statement of the nonexistence of another assignment involving the same transaction, as well as an itemized statement of the amount then due to the assignee [Lab. Code § 300(b)(6); see Lab. Code § 300(b)(2), (4), (5); see also [d], above]. The employer is required to withhold the amount specified in the assignment and to make the withheld amounts available to the assignee at the time the wages are payable [Lab. Code § 300(c)]. The employer will not be subject to any liability for relying on the spousal consent, statement of age and marital status, and statement of the nonexistence of another assignment involving the same transaction [see Lab. Code § 300(d)].

Deductions that the employee has requested the employer to make from his or her wages to pay for certain insurance premiums, taxes, pension plans, and other benefits, are not covered by the Labor Code wage-assignment provisions [Lab. Code § 300(g)].

[g] Wage Assignments in Consumer Contracts

An assignment-of-wages provision may not be included in a retail installment contract for the sale of goods or services [see Civ. Code § 1804.1(c)] or a motor vehicle conditional sale contract [see Civ. Code § 2983.7(b)]. However, this restriction specifically does not prohibit the giving of an assignment of wages in a separate instrument pursuant to the Labor Code [Civ. Code §§ 1804.1(c), 2983.7(b)].

[2] FORM**Assignment of Wages**

Assignment of Wages

For valid consideration received, [name of assignor] (Assignor) assigns to [name of assignee] (Assignee) the sum of \$_____ out of the total wages earned and payable to Assignor by _____ [name and address of employer]. This amount shall be payable to Assignee on each payment of Assignor's wages until the underlying obligation is satisfied or until this assignment is revoked in writing by Assignor.

Assignor acknowledges a debt obligation to Assignee for the following itemized amounts: [itemize amounts owed to assignee].

The transaction to which this assignment relates is [specifically describe underlying transaction].

Assignor affirms that no other assignment exists in connection with the transaction described above.

Assignor affirms that Assignor is [specify status, e.g., married or an unmarried adult or an unmarried minor] [add if assignor is legally separated married person: and that Assignor is legally separated under _____ (a judgment decreeing legal separation or an interlocutory judgment of dissolution of marriage) from Assignor's spouse].

This Assignment shall be binding on and shall inure to the benefit of the respective heirs, devisees, legatees, executors, administrators, trustees, successors, and assigns of the parties to this Assignment.

This Assignment shall be governed by and construed in accordance with the laws of California.

Dated: _____

ASSIGNOR

_____ [signature]
 [typed name of assignor]

Notary's Certificate

State of California
 County of _____

On [date], before me _____ [name and title of officer taking acknowledgment], personally appeared _____ [name(s) of person(s) signing instrument], who proved to me on the basis of satisfactory evidence to be the person[s] whose name[s] [is or are] subscribed to the within instrument and acknowledged to me that [she or he or they] executed the same in [her or his or their] authorized [capacity or capacities], and that by [her or his or their] [signature or signatures] on the instrument, the person[s] or the entity upon behalf of which the person[s] acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

[Notarial Seal]
 _____ [signature]
 [typed name]

Notary public for the State of California.

My commission expires: _____ [date].

[Add if assignor is married:]

Spouse's Consent

I am the legal spouse of Assignor. I hereby consent to this Assignment of Wages to [name of assignee] dated [date of assignment].

Dated: _____
 _____ [signature]
 [typed name of spouse]

[Include notarial certificate for spouse's consent here; see above].

[Add if assignor is unmarried minor:]

Consent to Minor's Wage Assignment

I am the _____ [parent *or* guardian of the estate, under appointment of the Superior Court of _____ County, Proceeding No. _____,] of _____ [name of minor], a minor. I am _____ [entitled to the earnings *or* responsible for the management of the estate] of the minor, and in that capacity I consent to the foregoing assignment of wages.

Dated: _____
_____ [signature]
[typed name of parent or guardian]

Legal Topics:

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

Contracts LawPerformanceGeneral OverviewContracts LawPerformanceAssignmentGeneral OverviewLabor & Employment LawWage & Hour LawsGeneral Overview



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27-76 California Legal Forms--Transaction Guide § 76.203

§ 76.203 Assignment for Collection

[1] Comment

[a] Use of Form

The form in [2], below, may be used for an assignment of a claim or debt for purposes of collection. Collection agencies normally require an assignment of this type before undertaking the collection of a debt. Assignments for collection are not subject to specific drafting requirements. This form is an example of the kind of form that a collection agency might use.

The practices of debt collectors are governed by the Robbins-Rosenthal Fair Debt Collection Practices Act [*see Civ. Code § 1788 et seq.*] and the federal Fair Debt Collection Practices Act [*see 15 U.S.C. § 1692 et seq.*; 16 C.F.R. § 237.0 et seq.]. For discussion, see Ch. 92, *Service Contracts*.

For discussion and a form for assignments of accounts receivable, see § 76.204.

[b] Validity of Assignments for Collection

Assignments for collection are generally recognized as valid, even though no consideration has been given [*Bechtel v. Baglieto* (1936) 13 Cal. App. 2d 495, 501, 57 P.2d 192] . The effect of an assignment for collection is to vest legal title in the assignee, sufficient to enable the assignee to maintain an action in his or her own name while the assignor retains the equitable or beneficial interest in the underlying claim [*Mihojevich v. Harrod* (1963) 214 Cal. App. 2d 360, 363, 29 Cal. Rptr. 440] .

[2] FORM

Assignment for Collection

Contract and Assignment for Collection

Assignee: _____ [*name of collection agency*]

_____ [*business address*]

[*telephone number*]

Name of debtor: _____

Name of debtor's spouse: _____

Telephone number: _____

Current address: _____

Former address, if known: _____

Debtor's occupation: _____

Debtor's employer: _____

Employer's address: _____

Former employer, if known: _____

Debtor's social security number: _____

Amount owed: \$ _____

Date of last payment: _____

Date of last charge: _____

In consideration of Assignee's acceptance of the claim for collection listed above, [*name of assignor*] (Assignor) hereby assigns this claim to Assignee on the following terms and conditions.

1. Full authority is conferred on Assignee to perform all lawful acts deemed necessary by Assignee, or its agents, to collect the claim listed above.
2. This assignment is an exclusive right to collect on the claim listed above. Assignor warrants that no other assignment governing the collection of this claim has been made.
3. Assignee is authorized to adjust or compromise this claim for [not less than \$ _____ (*amount of assignor's interest in assigned balance*)] or any amount that Assignee deems reasonable under the circumstances].
4. Assignee shall receive _____ percent commission on all money or its equivalent paid on account of the claim to Assignee or its agents, or to Assignor after the execution of this Assignment.
5. In the event the debtor makes any payments on the claim directly to Assignor, Assignor shall notify Assignee of the amounts paid. Assignee shall be entitled to its commission on these amounts and may deduct the commission from any other money due to Assignor from collections made by Assignee.
6. Assignee is authorized to endorse for deposit and collection any negotiable instruments received by Assignee made payable to Assignor for payment on the claim.
7. As additional compensation, and to offset losses suffered on claims not collected, Assignee may collect and retain any interest on the claim that is due and owing to Assignor.
8. Within 60 days after Assignor receives any payment on the claim, Assignor shall submit to Assignee a written statement of account setting forth all credits and deductions, except that the statement need not account for (1) court costs recovered that were previously advanced by Assignee and (2) attorneys' fees and interest or other charges incidental to the principal of the claim to which Assignee is properly and legally entitled. On submittal of the statement of account, Assignee shall remit any and all money due to Assignor on account of collection of the claim.
9. Assignor may have the claim withdrawn from collection by giving Assignee [*number*] days' notice of that order for

withdrawal. On withdrawal of the claim, Assignee shall be compensated for services extended in collecting that claim in the amount of [\$_____ per hour or _____ percent of the claim].

10. Time is of the essence.

11. This agreement and each of its provisions shall be binding on and shall inure to the benefit of the respective heirs, devisees, legatees, executors, administrators, trustees, successors, and assigns of the parties to this agreement.

12. This agreement may be amended only by a writing signed by the party against whom or against whose successors and assigns enforcement of the change is sought.

13. If any term or provision of this agreement or any application thereof shall be held invalid or unenforceable, the remainder of this agreement and any application of the terms and provisions shall not be affected but shall remain valid and enforceable.

14. This agreement shall be governed by and construed in accordance with the laws of California.

Dated: _____

ASSIGNOR

_____ [signature]

[typed name of assignor]

ASSIGNEE

_____ [signature]

[typed name of assignee]

Legal Topics:

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

Contracts LawContract Conditions & ProvisionsGeneral OverviewContracts LawPerformanceGeneral
OverviewContracts LawPerformanceAssignmentGeneral Overview



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27-76 California Legal Forms--Transaction Guide § 76.204

§ 76.204 Assignment of Accounts Receivable**[1] Comment--Use of Form**

The form in [2], below, is an assignment of accounts receivable. It may be used to assign amounts owed to a creditor, in the event of the sale or transfer of the creditor's business. This form should not be used when the creditor seeks financing for business operations and will offer accounts receivable as security for that financing. An assignment of accounts receivable intended as a security interest must comply with the provisions of the California Commercial Code governing secured transactions [see *Com. Code § 9109(a)(1)*]. For discussion and forms for assignments of accounts receivable for financing purposes, see Ch. 44, *Accounts Receivable Financing and Factoring* .

All account debtors under this assignment should be notified of the assignment. For a notice of assignment, see § 76.211.

For a form for assignment of accounts for collection, see § 76.203.

[2] FORM**Assignment of Accounts Receivable**

Assignment of Accounts Receivable

This Assignment is entered into on _____[date] between _____[name] (Assignor), [status, e.g., a California corporation or a sole proprietor], _____[address or principal place of business in California], California, and _____[name] (Assignee), [status], _____[address or principal place of business in California], California, subject to the following terms and conditions.

1. For value received, Assignor transfers and assigns to Assignee all of Assignor's right, title, and interest in and to the accounts, commercial paper, notes, and contracts receivable listed below in Paragraph 2. The assigned interest takes

effect in each case as of the respective date of shipment and sale of goods and services to each account debtor. The assigned interest includes any security or guarantees given to Assignor and specifically includes the proceeds of any credit insurance due and payable in connection with the assigned accounts.

2. This Assignment applies to the following accounts: _____ [*specify by each debtor's name and address, invoice date and number, payment due date, and total amount due (or other information customary within parties' business field)*].

3.(a) The rights transferred and assigned to Assignee include all of the following:

(1) The right of stoppage in transit;

(2) The right to make and effect collections from the account debtors in Assignee's own name and for its own benefit; and

(3) The right to endorse and deposit in Assignee's own bank account any commercial paper, notes, or other acceptances received in full or partial payment of the accounts or merchandise represented by and sold under those accounts.

(b) In the event the merchandise represented by accounts receivable in this Assignment is not received or accepted by the purchasers, the title to any account, contract, or any merchandise created through the resale or exchange of the rejected merchandise, including all sums of money due and to become due, shall be the property of the Assignee.

4. Assignor warrants and represents that the following statements are true to Assignor's knowledge and belief:

(a) Copies of any and all financial statements, invoices, orders, proofs of delivery, and other documents submitted to Assignee in connection with this Assignment, including the statements made in Paragraph 2 above, are factual and genuine.

(b) This Assignment is exclusive and made solely to the Assignee. None of the accounts receivable being assigned has been sold or assigned to any other party, unless notice of another assignment has been given to Assignee specifically describing the other assignment.

(c) The accounts stated in Paragraph 2 above are valid and fully collectible from the account debtors. There are no existing offsets or counterclaims against any of the accounts. Each account debtor is unconditionally indebted to Assignor for the amounts indicated in Paragraph 2 above.

(d) The goods described in and covered by the account invoices and statements listed in Paragraph 2 above were manufactured in strict accordance with specifications provided by the account debtors. The goods and services covered by the listed invoices have been sold pursuant to unconditional contracts of sale and not by consignment or sale on approval.

(e) Assignor delivered goods and services pursuant to genuine purchase orders issued by the account debtors. Delivery was made at the request of the account debtors and in accordance with the shipping instructions included in those purchase orders. As of the date of this Assignment none of the purchase orders received by Assignor has been canceled or otherwise altered by account debtors or their agents.

(f) The merchandise underlying the assigned accounts has not been previously sold, conveyed, or encumbered by Assignor or its agents. The title to these accounts has in no way been previously transferred in whole or in part for the purpose of sale or security. As of the date of this Assignment, no person or entity other than Assignor has acquired any

lien, right, title, or claim to the accounts or the merchandise underlying those accounts.

(g) As of the date of this Assignment, the account debtors have not paid to Assignor, or its agents, any part of the purchase price of the goods and services covered by the invoices listed in Paragraph 2, above, except as indicated in that paragraph. As of the date of this Assignment, account debtors do not have any claims against the amounts owed on the assigned accounts by offset, counterclaim, or otherwise. There are no other circumstances entitling the account debtors to refuse to pay the accounts or to decrease the price of the goods and services as originally agreed on in the invoices described in Paragraph 2, above.

5. Time is of the essence in this Assignment.

6. This Assignment shall be binding on and shall inure to the benefit of the respective heirs, devisees, legatees, executors, administrators, trustees, successors, and assigns of the parties to this Assignment.

7. This Assignment may be amended only by a writing signed by the party against whom or against whose successors and assigns enforcement of the change is sought.

8. This Assignment shall be governed by and construed in accordance with the laws of California.

Dated: _____

ASSIGNOR

_____ [signature]

[typed name of assignor]

Legal Topics:

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

Banking Law Consumer Protection Fair Debt Collection General Overview Contracts Law Contract Conditions & Provisions General Overview Contracts Law Performance Assignment General Overview



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27-76 California Legal Forms--Transaction Guide § 76.205

§ 76.205 Partial Assignment

[1] Comment

[a] Use of Form

The form in [2], below, may be used to make a partial assignment of rights under a contract or cause of action. It contains alternative provisions covering partial assignment of a contract, an account for collection, and a cause of action. Normally, partial assignments require the consent of the contract obligor, account debtor, or defendant in a cause of action [see [b], below], and for that reason this form should be accompanied by an executed consent form [see § 76.210].

For further discussion of an assignment of a contract and its rights and obligations, see § 76.200[1]. For discussion of the assignment of an account for collection, see § 76.203[1]. For discussion of the assignment of a cause of action, see § 76.201[1].

[b] Consent Requirement

In order for a partial assignment to be valid, the consent of the obligor or debtor is normally required [see *Grain v. Aldrich* (1869) 38 Cal. 514, 519]. With respect to partial assignments of contracts, this rule is intended to prevent the obligor from being subject to multiple claims and responsibilities not contemplated under the original contract [*D'Orazi v. Bank of Canton* (1967) 254 Cal. App. 2d 901, 905, 62 Cal. Rptr. 704]. Similarly, partial assignments of accounts for collection require the debtor's consent, to protect the debtor from unreasonable costs if legal action must be taken to recover the amount owed [see, e.g., *Stein v. Cobb* (1940) 38 Cal. App. 2d 8, 10, 100 P.2d 358]. With respect to partial assignments of a cause of action, the defendant's consent must be obtained in order to prevent multiple suits through the splitting of the cause of action without the defendant's consent [see *Meserve v. Superior Court* (1934) 2 Cal. App. 2d 468, 476, 38 P.2d 453].

[c] Enforceability of Partial Assignments

Partial assignments of contract rights or accounts for collection made without the consent of the obligor or debtor are not enforceable in an action at law [see *[b]*, above]. Nonetheless an assignee of a partial interest has the right to bring all parties before the court for an equitable determination of the assignee's rights under the assignment [*Gause v. Pacific Gas & Electric Co.* (1923) 60 Cal. App. 360, 371] . Courts have been willing to validate a nonconsensual partial assignment if justified under general principles of equity [see *Goldman v. Murray* (1912) 164 Cal. 419, 421-424 ; *McKay v. Security-First Nat. Bank* (1939) 35 Cal. App. 2d 349, 96 P.2d 376] .

[2] FORM

Partial Assignment

Assignment

For consideration received, consisting of [specify consideration, e.g., \$500], [name of assignor] (Assignor) transfers and assigns to [name of assignee] (Assignee)

[EITHER, for partial assignment of contract:]

the following rights under the contract entered into _____[date] by and between Assignor and _____[name of obligor]: [specify rights under contract to be assigned, e.g., the right to receive 500 tons of corn pursuant to the contract]. This partial assignment is intended to convey to Assignee all of Assignor's right, title, and interest in the assigned rights under the contract, with full power to collect, bring an action on the assigned portion of the underlying contract, and reassign.

[OR, for partial assignment of amount owed:]

the sum of \$_____ out of the money due under the [specify type of underlying obligation, e.g., contract or promissory note] entered into _____[date] by and between Assignor and _____[name of debtor]. This partial assignment is intended to convey to Assignee all of Assignor's right, title, and interest in the assigned portion of the amount due, with full power to collect the sum when it becomes due, give a receipt evidencing the discharge of that portion of the underlying obligation, bring an action on the assigned portion of the debt, and reassign.

[OR, for partial assignment of cause of action:]

the portion of the cause of action for damages to [specify subject, e.g., Assignor's tractor] arising from an action for [specify cause of action, e.g., negligence] against _____[name of defendant]. The circumstances giving rise to the stated cause of action are as follows: [describe]. This partial assignment is intended to convey to Assignee all of Assignor's right, title, and interest in the assigned portion of the cause of action, with full power to prosecute, compromise, settle, reassign, and give a release in full settlement of, the assigned portion of the cause of action.

[CONTINUE]

This Assignment shall be binding on and shall inure to the benefit of the respective heirs, devisees, legatees, executors, administrators, trustees, successors, and assigns of the parties to this Assignment.

This Assignment shall be governed by and construed in accordance with California law.

Dated: _____

ASSIGNOR

_____ [signature]

[typed name of assignor]

[Add appropriate consent here; see § 76.210[2] .]

Legal Topics:

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

Contracts LawPerformanceGeneral OverviewContracts LawPerformanceAssignmentGeneral Overview



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27-76 California Legal Forms--Transaction Guide §§ 76.206-76.209

[Reserved]

§§ 76.206[Reserved]



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PART IV. FORMS
B. Consents and Notices

27-76 California Legal Forms--Transaction Guide § 76.210

§ 76.210 Consent to Assignment

[1] Comment

[a] Use of Form

The form in [2], below, contains alternative provisions for consent to an assignment and may be used when the consent of the obligor is required either by the underlying contract or by statute; when duties are to be delegated under a contract; or when a partial assignment of a contract, account owed, or cause of action is made. The consent should be appended to the assignment.

For discussion of the requirement of consent to partial assignments of contracts and causes of action, see § 76.205[1].

The form in [2], below, should not be used for spousal or parental consent to wage assignments. The forms for spousal and parental consent to wage assignments are incorporated in the assignment in § 76.202[2].

[b] Requirement of Consent

When rights under a contract are being assigned, the consent of the obligor ordinarily is not necessary unless the consent is required by statute or the contract [*La Rue v. Groezinger* (1890) 84 Cal. 281, 289, 24 P. 42] . For discussion of provisions governing the assignment of a contract, see Ch. 75, *Formation of Contracts and Standard Contractual Provisions* .

When contractual duties are being delegated, the consent of the party entitled to the benefit of the duty is required [Civ. Code § 1457]. An assignment or delegation of duties under a contract made without the consent of the person to whom the duty is owed will not automatically void the assignment but gives that person the option to void the assignment [*Randol v. Tatum* (1893) 98 Cal. 390, 397, 33 P. 433] . An assignee may assume the obligations of a contract; however, the assignor cannot be relieved of liability under the contract without the consent of the other party to the original contract [*Britschgi v. McCall* (1953) 41 Cal. 2d 138, 144, 257 P.2d 977] .

In order for a partial assignment to be valid, the consent of the obligor, debtor, or defendant is normally required [see *Grain v. Aldrich* (1869) 38 Cal. 514, 519] . This rule is intended to protect the rights of a contract obligor, debtor, or defendant. For further discussion of the consent requirement for partial assignments, see § 76.205[1][b].

[2] FORM

Consent to Assignment

Consent to Assignment

[EITHER, for complete or partial assignment of contract, account for collection, or cause of action requiring consent:]

I consent to the assignment to [name of assignee] of the [contract between or account existing between or cause of action involving] me and [name of assignor].

[OR, for assignment that includes delegation of contractual duties:]

I consent to the assignment to [name of assignee] of the following duties under the contract dated _____ by and between me and [name of assignor]: [specify]. I further agree to hold Assignor harmless for any breach of the contract subsequent to the execution of this Assignment and shall look solely to Assignee for performance under the contract.

[CONTINUE]

Dated: _____
 _____ [signature]
 [typed name of consenting party]

Legal Topics:

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

Contracts LawPerformanceGeneral OverviewContracts LawPerformanceAssignmentGeneral OverviewContracts LawPerformanceAssignmentConsent



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DIVISION V: CONTRACTS AND OBLIGATIONS
CHAPTER 76 ASSIGNMENTS OF RIGHTS AND OBLIGATIONS
PART IV. FORMS
B. Consents and Notices

27-76 California Legal Forms--Transaction Guide § 76.211

§ 76.211 General Notice of Assignment

[1] Comment

[a] Use of Form

The form in [2], below, may be used, by either the assignee or the assignor, to notify an obligor or a debtor of an assignment of rights under a contract [see § 76.14[4]].

For forms for assignments, see §§ 76.200-76.205. For discussion and a form for consent to an assignment, see § 76.210. For discussion and a form for the notice concerning assignment of a contract for dance studio lessons or health studio services, see § 76.212.

[b] Effect of Notice

After an obligor or debtor has received notice of the assignment of rights, the obligor or debtor must make payments to the assignee, and will deal with the assignor at his or her peril [see, e.g., *Ismay v. Tyler* (1959) 337 P.2d 257 (assignment of claim)]. Furthermore, after notice of the assignment, a debtor or obligor cannot contrive with the assignor to defraud the assignee by a purported settlement with the assignor [*Nineteenth Realty Co. v. Diggs* (1933) 134 Cal. App. 278, 285-286, 25 P.2d 522] .

In the event that an assignor makes multiple assignments of the same chose (thing) in action, the priority of the successive assignees must be established. California courts have adopted the notice rule, which gives the highest priority to the assignee who first serves notice of the assignment [see *First Nat. Bank v. Pomona Tile Mfg. Co.* (1947) 82 Cal. App. 2d 592, 605, 186 P.2d 693] .

[2] FORM

General Notice of Assignment

General Notice of Assignment

TO: _____[*name of debtor or obligor*]

TAKE NOTICE that on [*date of assignment*] [*name of assignor*] assigned and transferred all of _____[*his or her or its*] interest in your [*specify, e.g., contract or promissory note*] dated _____[*his or her or its*]. You are directed to [*specify, e.g., make all further payments or render all further performance*] to the Assignee, [*name of assignee*] at _____[*address*]. Your [*payment or performance*] to the Assignee will discharge your obligation under the [*contract or promissory note*] described above.

_____[*signature*]
[*typed name of assignor or assignee*]

Legal Topics:

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

Contracts LawPerformanceGeneral OverviewContracts LawPerformanceAssignmentGeneral Overview



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DIVISION V: CONTRACTS AND OBLIGATIONS
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B. Consents and Notices

27-76 California Legal Forms--Transaction Guide § 76.212

§ 76.212 Notice of Assignment--Contract for Dance Studio Lessons or Health Studio Services

[1] Comment

[a] Use of Form

The form in [2], below, may be used to notify a consumer that the seller has assigned the consumer's contract for dance studio lessons and other services or health studio services. Specific statutory requirements govern contracts for the provision of these services [*see Civ. Code §§ 1812.50 et seq., 1812.80 et seq.*]. For further discussion of the statutory requirements for those contracts, see Ch. 92, *Service Contracts* . For a form for the notice that should be used for assignments of contracts and claims not governed by the statutory provisions in question, see § 76.211[2].

[b] Purpose of Notice Requirement

The California legislature has found that widespread fraud and deceptive trade practices existed in the business of selling contracts for dance studio lessons [*see Civ. Code § 1812.50*] and health studio services [*see Civ. Code § 1812.80*]. Consumers entering into such contracts are protected against the loss of a right of action or defense relating to those contracts, in the event of an assignment by the seller. A consumer may not be barred from bringing any action or raising any defense against the seller after assignment of the contract unless the assignee has given valid notice of the assignment to the consumer [*see Civ. Code §§ 1812.56, 1812.88*].

[c] Notice Requirements

When a seller (assignor) assigns a contract for dance studio lessons or health studio services, the assignee must send a written notice of assignment addressed to the consumer at the address shown on the contract. The notice must identify the contract and state that the consumer has 30 days from the date of mailing of the notice to notify the assignee in writing of any facts giving rise to a claim or defense that the consumer may have against the seller. The notice of assignment must include the following [*Civ. Code §§ 1812.56, 1812.88*]:

- The name of the seller.

- The name of the consumer.
- A description of the lessons or services contracted for.
- The balance on the contract.
- The number and amount of the installments.

[2] FORM

Notice of Assignment--Contract for Dance Studio Lessons or Health Studio Services

TO: _____ [name of consumer]

In accordance with the California Civil Code, this notice informs you that your contract for [dance studio lessons and other services *or* health studio services], which you entered into on _____ [date] with _____ [name of seller], has been assigned to [name of assignee] pursuant to an assignment executed _____ [date].

The contract provides for the following services: [*specifically describe contract services*].

As of the date of this notice, the balance due on the contract is \$_____, payable in [number] installments of \$_____.

As of the date of mailing of this notice, you have 30 days in which to notify the assignee in writing of any facts giving rise to a claim or defense arising out of any dispute in relation to the contract. Failure to provide written notice of these facts may bar you from raising these matters in any future action or litigation. All correspondence should be directed to the assignee's address below.

ASSIGNEE

_____ [signature]
 _____ [name of assignee]
 _____ [address]
 _____ [city, state, zip code]

Legal Topics:

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

Contracts Law Contract Conditions & Provisions General Overview Contracts Law Performance General Overview Contracts Law Performance Assignment General Overview Contracts Law Types of Contracts General Overview



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DIVISION V: CONTRACTS AND OBLIGATIONS
CHAPTER 77 DISCHARGE OF OBLIGATIONS

27-77 California Legal Forms--Transaction Guide 77.syn

§ 77.syn Synopsis to Chapter 77: DISCHARGE OF OBLIGATIONS

§ 77.01 California Statutes

[1] Obligations

[2] Performance and Excuse for Nonperformance

[3] Accord and Satisfaction

[4] Compromise, Settlement, and Release

[5] Account Stated

[6] Novation

[7] Modification

[8] Rescission

[9] Cancellation and Termination

§§ 77.02-77.04 [Reserved]

§ 77.05 Law Reviews

§ 77.06 Annotations

[1] Compromise, Settlement, and Release

[2] Account Stated

[3] Novation

§ 77.07 Text References

[1] Matthew Bender Sources

[2] Other Text References

§§ 77.08-77.09 [Reserved]

§ 77.10 Governing Law

[1] Obligations Generally

[2] Contracts for Sale of Goods (UCC Sales)

§ 77.11 Obligations

[1] In General

[2] Methods of Discharging Obligations

§ 77.12 Discharge Through Performance

[1] In General

[2] Joint Obligations

[3] Partial Performance

§ 77.13 Discharge Through Offer of Performance

[1] In General

[2] Conditions of Offer

[3] Delivery of Thing Offered

[4] Effect of Offer on Obligation

[5] Who Makes and Receives Offer

[6] Where Offer May Be Made

[7] When Offer Must Be Made

[8] Offer Made After Performance Is Due

[9] Waiver of Objections by Obligee

§ 77.14 Excuse for Lack of Performance or Offer of Performance

[1] In General

[2] Prevention by Obligee or Operation of Law

[3] Prevention Induced by Obligee

[4] Prevention by Superhuman Causes or Public Enemy

[5] Prevention by Impossibility

[6] Prevention by Impracticability

[7] Prevention by Frustration of Purpose

§ 77.15 Anticipatory Breach

[1] Obligee's Refusal to Accept Performance Before It Is Offered

[2] Obligor's Refusal to Perform

§ 77.16 Accord and Satisfaction

[1] Definitions

[2] Distinguished From Executory Accord

[3] Distinguished From Release

[4] Compared With Compromise and Settlement

[5] Distinguished From Novation

[6] Essential Elements of Accord and Satisfaction

[a] In General

[b] Proper Subject Matter

[c] Existence of Dispute as a Factor

[d] Meeting of Minds

[e] Consideration for Accord and Satisfaction

[f] Bona Fide Dispute as Element of Consideration

[g] Partial Performance Exception to Consideration Requirement

§ 77.17 Compromise and Settlement Agreements

[1] Definition

[2] Nature and Legal Effect

[3] Matters Covered

[4] Distinguished From Release

[5] Use of Release With Compromise Agreement

[6] Essential Elements of Compromise Agreements

[a] In General

[b] Parties

[c] Meeting of the Minds

[d] Consideration for Compromise Agreement

[e] Consideration in Probate Compromises

[7] Offer for Compromise Settlement of Matter in Litigation

§ 77.18 Releases

[1] In General

[2] Effect of General Release on Unknown Claims

[3] Effect of General Release on Insurance Bad Faith Claims

[4] Legal Requirements for Valid Release

[a] Consideration

[b] Mutual Assent

[c] Type Size

[d] Clear and Explicit Language

[e] Legal Object

[5] Releases When There Are Multiple Obligor

[a] Effect of Release

[b] Exceptions to Rules Governing Effect of Release

[c] Good Faith Requirement

[6] Exculpatory Releases

[a] In General

[b] Release Affecting Public Interest

§ 77.19 Account Stated

[1] Definition

[2] Legal Effect

[3] Statute of Limitations

[4] Creation

[5] Nature of Underlying Transaction

[6] Defenses Against Account Stated

§ 77.20 Novation

[1] Definition and Nature

[2] Legal Effect

[3] Statutory Right to Rescind

[4] Application of Contract Principles

[5] Consent Required for Novation

[6] Intent Required for Substitution of New Parties

[7] Consideration Required for Novation

§ 77.21 Modification

[1] Definition

[2] Written Modification of Oral Contract

[3] Method of Modifying Written Contracts

[4] Consideration Required for Modification

[5] Mutuality Required for Modification

§ 77.22 Rescission

[1] In General

[2] Unilateral Rescission

[a] Generally

[b] Insurance Contract

[3] Home Solicitation Contracts

[4] Home Equity Purchase Contracts

[5] Rescission Under Truth in Lending Act

[6] Rescission Distinguished From Cancellation

§ 77.23 Cancellation

[1] Different Uses of Term

[2] Termination of Contract for Breach

[3] Termination or Cancellation of Sale of Goods

[4] Cancellation or Destruction of Written Contract

[a] Act of Parties

[b] Court-Ordered Cancellation

§§ 77.24-77.99 [Reserved]

§ 77.100 Basic Facts Concerning All Transactions

Scope

§ 77.101 Facts Concerning Performance and Excuse for Nonperformance

Scope

§ 77.102 Facts Concerning Accord and Satisfaction

Scope

§ 77.103 Facts Concerning Settlement and Release

Scope

§ 77.104 Facts Concerning Account Stated

Scope

§ 77.105 Facts Concerning Novation

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§ 77.106 Facts Concerning Modification

Scope

§ 77.107 Facts Concerning Mutual Rescission

Scope

§ 77.108 Facts Concerning Unilateral Rescission

Scope

§ 77.109 Facts Concerning Cancellation of Contract

Scope

§ 77.110 Facts Concerning Termination of Contract for Breach

Scope

§ 77.111 Documents

Scope

§§ 77.112-77.119 [Reserved]

Scope

§ 77.120 Performance or Excuse for Nonperformance

Scope

§ 77.121 Contract Changes (Accord and Satisfaction, Novation, and Modification)

Scope

§ 77.122 Compromise, Settlement, and Release of Obligation

Scope

§ 77.123 Exculpatory Release From Future Claims

Scope

§ 77.124 Account Stated

Scope

§ 77.125 Rescission

Scope

§ 77.126 Termination for Breach and Cancellation

Scope

§§ 77.127-77.139 [Reserved]

Scope

§ 77.140 Performance or Excuse for Nonperformance

Scope

§ 77.141 Accord and Satisfaction

Scope

§ 77.142 Compromise, Settlement, and Release

Scope

§ 77.143 Account Stated

Scope

§ 77.144 Novation

Scope

§ 77.145 Modification

Scope

§ 77.146 Rescission

Scope

§ 77.147 Termination for Breach and Cancellation

Scope

§§ 77.148-77.199 [Reserved]

§ 77.200 Receipt for Full Performance in Discharge of Single Obligation

[1] Comment

[a] Use of Form

[b] Discharge of More Than One Obligation to Same Obligee

[c] Acceptance of Full Performance Discharges Obligation

[d] Right to Require Proper Receipt

[e] Multiple Obligors or Obligees

[2] FORM

Receipt for Full Performance in Discharge of Single Obligation

§§ 77.202-77.209 [Reserved]

§ 77.210 Offer of Performance, Acceptance, and Receipt--Accompanied by Actual Delivery

[1] Comment

[a] Use of Form

[b] Basic Requirements for Valid Offer of Performance

[c] When and How Offer Must Be Made

[d] Obligation for Payment of Money

[e] Delivery and Title

[f] Running of Interest and Other Incidents of Obligation

[g] Refusal of Valid Offer

[h] Waiver of Defects in Performance

[2] FORM

Offer of Performance, Acceptance, and Receipt--Accompanied by Actual Delivery

§ 77.211 Offer of Performance, Acceptance, and Receipt--Discharge of Multiple Obligations

[1] Comment

[a] Use of Form

[b] Effect of Partial Performance

[c] Application of Performance--Several Obligations

[2] FORM

Offer of Performance, Acceptance, and Receipt--Discharge of Multiple Obligations

§ 77.212 Offer of Performance and Acceptance--Not Accompanied by Actual Delivery

[1] Comment

[a] Use of Form

[b] Legal Advantages

[c] Acceptance

[d] Separate Receipt

[2] FORM

Offer of Performance and Acceptance--Not Accompanied by Actual Delivery

§ 77.213 Offer of Performance and Acceptance--Late Offer After Maturity of Obligation

[1] Comment

[a] Use of Form

[b] Offer Made After Obligation Is Due

[2] FORM

Offer of Performance and Acceptance--Late Offer After Maturity of Obligation

§§ 77.214-77.219 [Reserved]

§ 77.220 Accord Agreement and Receipt for Performance in Satisfaction

[1] Comment

[a] Use of Form

[b] Accord and Satisfaction

[c] Elements of Accord and Satisfaction

[d] Obligor's Right to Receipt for Performance Tendered

[2] FORM

Accord Agreement and Receipt for Performance in Satisfaction

§ 77.221 Offer of Accord, Acceptance, and Receipt of Consideration in Satisfaction

[1] Comment--Use of Form

[2] FORM

Offer of Accord, Acceptance, and Receipt of Consideration in Satisfaction

§ 77.222 Accord and Satisfaction--Undisputed Obligation--Partial Performance Without New Consideration

[1] Comment

[a] Use of Form

[b] Agreement for Partial Performance Without New Consideration

[2] FORMs

[a] Acceptance of Partial Performance

Acceptance of Partial Performance

[b] Agreement and Receipt

Accord and Satisfaction

§§ 77.223-77.229 [Reserved]

§ 77.230 Accord and Satisfaction Endorsement

[1] Comment

[a] Use of Form

[b] Partial Performance as Satisfaction--Requirement of Bona Fide Dispute

[c] Protest by Obligee; Inadvertent or Unknowing Acceptance

[d] Composition or Extension Agreement; Knowledge of Restriction

[e] Check Issued in Conjunction With Release of Claim

[f] Ability of Payee to Protest Under Commercial Code

[2] FORM

Accord and Satisfaction Endorsement

§§ 77.231-77.239 [Reserved]

§ 77.240 General Release--Existing Known and Unknown Claims--Single Adverse Party

[1] Comment

- [a] Use of Form
- [b] Release Given to One of Several Obligors
- [c] Cautionary Elements
- [d] Attorney's Authority to Settle Claim
- [e] Release Defined and Contrasted With Compromise and Settlement
- [f] Claims Extinguished by General Release
- [g] Unknown Claims
- [h] Insurance Bad Faith Claims
- [i] Consideration
- [j] Mutual Assent
- [k] Type Size
- [l] Clear and Explicit Language
- [m] Legal Object
- [n] Delay After Confinement in Clinic or Health Facility for Injury

[2] FORM

General Release--Existing Known and Unknown Claims--Single Adverse Party

§§ 77.241-77.249 [Reserved]

§ 77.250 Release of Future Claims--Hazardous Activity

[1] Comment

- [a] Use of Form
- [b] When Form May Not Be Used
- [c] Patients' Consents
- [d] Type Size
- [e] Clear and Explicit Language
- [f] Exculpatory Releases in General

[g] Release Affecting Public Interest

[2] FORM

Release of Future Claims--Hazardous Activity

§§ 77.251-77.259 [Reserved]

§ 77.260 Compromise and Settlement Agreement--Lump Sum Payment--Absence of Cross Claim

[1] Comment

[a] Use of Form

[b] Use of Form During or Before Litigation

[c] Release Used With Compromise Agreement

[d] Definition of Compromise and Settlement

[e] Income Tax Treatment of Damage Awards

[2] FORM

Compromise and Settlement Agreement--Lump Sum Payment--Absence of Cross Claim

§ 77.261 Compromise and Settlement Agreement--Lump Sum Payment--Mutual Release of Cross Claims

[1] Comment--Use of Form

[2] FORM

Compromise and Settlement Agreement--Lump Sum Payment--Mutual Release of Cross Claims

§ 77.262 Structured Settlement Agreement and Release

[1] Comment

[a] Use of Form

[b] Parties

[c] Provisions of Form

[d] Attorney's Authority to Settle

[e] Effect of Structured Settlement on Joint Tortfeasors

[f] Income Tax Treatment of Structured Settlement Payments

[2] FORM

Structured Settlement Agreement and Release

§ 77.263 Sliding Scale Settlement Agreement--Covenant Not to Enforce Judgment Against Settling Defendant

[1] Comment

[a] Use of Form

[b] Sliding Scale Recovery Agreements

[c] Determination of Good Faith Settlement

[2] FORM

Sliding Scale Settlement Agreement--Covenant Not to Enforce Judgment Against Settling Defendant

§ 77.264 Notice--Sliding Scale Settlement Agreement

[1] Comment--Use of Form

[2] FORM

Notice--Sliding Scale Settlement Agreement

§§ 77.265-77.269 [Reserved]

§ 77.270 Letter Authorizing Attorney to Settle

[1] Comment

[a] Use of Form

[b] Authority From Client To Bind Client to Settlement

[c] Authority From Client To Conduct Settlement Negotiations

[d] Attorney's Duty to Communicate Settlement Offers

[e] Drafting Considerations

[2] FORMs

[a] Letter From Client

Letter From Client

[b] Letter From Attorney

Letter From Attorney

§ 77.271 Unilateral Rescission--Release or Settlement Agreement Obtained Through Mistake, Fraud, Undue Influence, or Coercion

[1] Comment

[a] Use of Form

[b] Rescission of Release

[c] Avoidance of Release

[d] Release of Unknown Claims

[e] Nonnegligent Misapprehension as Ground for Avoidance

[2] FORM

Unilateral Rescission--Release or Settlement Agreement Obtained Through Mistake, Fraud, Undue Influence, or Coercion

§§ 77.272-77.279 [Reserved]

§ 77.280 Novation Agreement--New Obligation Between Same Parties

[1] Comment

[a] Use of Form

[b] Elements of Novation

[c] Legal Effect

[2] FORM

Novation Agreement--New Obligation Between Same Parties

§ 77.281 Novation Agreement--New Obligor

[1] Comment

[a] Use of Form

[b] Statutory Right to Rescind

[2] FORM

Novation Agreement--New Obligor

§ 77.282 Novation Agreement--New Oblige

[1] Comment--Use of Form

[2] FORM

Novation Agreement--New Obligee

§§ 77.283-77.289 [Reserved]

§ 77.290 Statement of Account

[1] Comment

[a] Use of Form

[b] Reasons for Use

[c] Essential Elements In General

[d] Assent by Debtor

[e] Drafting Considerations

[2] FORM

Statement of Account

§ 77.291 Statement of Account--Written Acceptance by Debtor

[1] Comment--Use of Form

[2] FORM

Statement of Account--Written Acceptance by Debtor

§§ 77.292-77.299 [Reserved]

§ 77.300 Statement of Account--Receipt on Debtor's Check

[1] Comment--Use of Form

[2] FORM

Statement of Account--Receipt on Debtor's Check

§§ 77.301-77.309 [Reserved]

§ 77.310 Statement of Account--Debtor's Objection

[1] Comment--Use of Form

[2] FORM

Statement of Account--Debtor's Objection

§§ 77.311-77.319 [Reserved]

§ 77.320 Modification of Written Contract

[1] Comment

[a] Use of Form

[b] Definition of Modification

[c] Requirements for Modification in General

[d] Contract for Sale of Goods

[2] FORM

Modification of Written Contract

§ 77.321 Mutual Modification Pursuant to Terms of Original Written Contract

[1] Comment

[a] Use of Form

[b] Requirements for Modification

[2] FORM

Mutual Modification Pursuant to Terms of Original Written Contract

§ 77.322 Notice of Unilateral Modification

[1] Comment--Use of Form

[2] FORM

Notice of Unilateral Modification

§ 77.323 Written Modification of Oral Contract

[1] Comment--Use of Form

[2] FORM

Written Modification of Oral Contract

§§ 77.324-77.329 [Reserved]

§ 77.330 Rescission by Mutual Consent

[1] Comment

[a] Use of Form

[b] Rescission Distinguished From Cancellation

[c] Rescission by Mutual Consent

[d] Consideration Based on Relinquishment of Rights

[e] Effect of Rescission on Third-Party Beneficiary

[2] FORM

Rescission by Mutual Consent

§§ 77.331-77.339 [Reserved]

§ 77.340 Notice of Unilateral Rescission

[1] Comment

[a] Use of Form

[b] Statement of Grounds for Rescission; Statutory Grounds

[c] Home Solicitation Contract

[d] Sale of Residence in Foreclosure

[e] Credit Transaction With Security Interest in Dwelling

[f] Requirement of Promptness

[g] Exceptions to Promptness Requirement

[h] Relief Based on Rescission

[i] Damages for Breach of Sale-of-Goods Contract

[j] Severability of Contract With Respect to Rescission

[2] FORM

Notice of Unilateral Rescission

§§ 77.341-77.349 [Reserved]

§ 77.350 Clause--Mistake as Ground for Rescission

[1] Comment

[a] Use of Form

[b] Mistake as Ground for Rescission

[c] Requirement That Mistake Be Material

[d] Mistake of Fact

[e] Mistake of Law

[2] FORM

Clause--Mistake as Ground for Rescission

§ 77.351 Clause--Duress or Menace as Ground for Rescission

[1] Comment

[a] Use of Form

[b] Duress or Menace as Ground for Rescission

[c] Definition of Duress

[d] Definition of Menace

[e] Threat of Criminal Prosecution

[f] Requirement of Unlawful Action

[g] Requirement of Intent

[h] Standard of Courage for Victim of Duress or Menace

[i] Duress or Menace by Third Person

[j] Proof of Duress

[2] FORM

Clause--Duress or Menace as Ground for Rescission

§ 77.352 Clause--Undue Influence as Ground for Rescission

[1] Comment

[a] Use of Form

[b] General Nature of Undue Influence

[c] Definition of Undue Influence; Domineering and Subservient Parties

[d] Elements of Undue Influence

[e] Effect of Subservient Party's Weakness

[f] Presumptions of Undue Influence--Attorney-Client Relationship

[g] Agent-Principal Relationship

[h] Domestic Relationship

[i] Friendship

[j] Effect of Presumption

[k] Effect of Independent Advice on Presumption

[l] Other Evidence to Overcome Presumption

[m] Presumption of Violation of Trustee's Fiduciary Duties

[2] FORM

Clause--Undue Influence as Ground for Rescission

§ 77.353 Clause--Fraud as Ground for Rescission

[1] Comment

[a] Use of Form

[b] Elements of Actual Fraud

[c] Misrepresentation of Material Fact

[d] Effect of Knowledge

[e] Actual and Justified Reliance

[f] Requirement of Damage

[g] Constructive Fraud

[h] Comparison of Fraud and Undue Influence

[i] Proof of Fraud

[j] Waiver of Consequences of Fraud

[k] Negligence of Defrauded Party

[2] FORM

Clause--Fraud as Ground for Rescission

§ 77.354 Clause--Failure of Consideration as Ground for Rescission

[1] Comment

[a] Use of Form

[b] Failure of Consideration as Ground for Rescission

[c] Fault of Other Party

[d] Void Consideration

[e] Failure of Consideration Before Delivery

[2] FORM

Clause--Failure of Consideration as Ground for

§ 77.355 Clause--Illegality of Contract as Ground for Rescission

[1] Comment

[a] Use of Form

[b] When Rescission Is Allowed for Illegality

[c] Contract Prohibited by Law

[d] Contract Contrary to Policy of Express Law

[e] Contract Contrary to Good Morals

[f] Effect of Illegal Contract

[g] Severability of Illegality

[2] FORM

Clause--Illegality of Contract as Ground for Rescission

§ 77.356 Clause--Contract Prejudicial to Public Interest as Ground for Rescission

[1] Comment

[a] Use of Form

[b] Contract Prejudicial to Public Interest

[2] FORM

Clause--Contract Prejudicial to Public Interest as Ground

§§ 77.357-77.359 [Reserved]

§ 77.360 Notice of Termination--Material Breach

[1] Comment

[a] Use of Form

[b] Material Breach Justifying Termination

[2] FORM

Notice of Termination--Material Breach

§ 77.361 Notice of Termination--Anticipatory Breach

[1] Comment

[a] Use of Form

[b] What Constitutes Anticipatory Breach

[2] FORM

Notice of Termination--Anticipatory Breach

§ 77.362 Notice of Termination--Severable Part of Contract

[1] Comment

[a] Use of Form

[b] Severable Contracts

[2] FORM

Notice of Termination--Severable Part of Contract

§§ 77.363-77.369 [Reserved]

§ 77.370 Agreement to Cancel Contract

[1] Comment

[a] Use of Form

[b] Cancellation of Written Contract

[c] Distinction Between Cancellation and Rescission

[d] Effect of Unilateral Destruction, Cancellation or Alteration of Contract

[2] FORM

Agreement to Cancel Contract



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DIVISION V: CONTRACTS AND OBLIGATIONS
CHAPTER 77 DISCHARGE OF OBLIGATIONS

27-77 California Legal Forms--Transaction Guide Scope

Scope

Scope

This chapter discusses methods by which legal obligations may be discharged without litigation; specifically, actual performance, offer (tender) of performance, excuse for nonperformance, account stated, accord and satisfaction, compromise and settlement, release, novation, modification, rescission, termination for breach, and cancellation.

The Legal Background discusses the basic legal distinctions, importance, and prerequisites of each of those methods. The Transaction Guide contains checklists of facts and documents that are needed and preliminary determinations that should be made to determine the legal status of the parties and the method of discharge to be used. It also includes guides to relevant procedures. The forms include notices and other writings evidencing discharge of legal obligations through the various methods of discharge covered in this chapter.

Contract provisions specifying the conditions under which the contract will terminate and the obligations of the parties will be terminated or otherwise affected (although not necessarily discharged) are discussed in Ch. 75, *Formation of Contracts and Standard Contractual Provisions* .

When a contract is assigned, the assignor's underlying obligation may be extinguished only with the consent of the party entitled to its benefit [*Civ. Code § 1457*], as discussed in Ch. 76, *Assignment of Obligations* .

Bankruptcy proceedings and creditors' agreements, including composition agreements, are specialized methods of discharging a debtor's obligations to creditors and are covered in Ch. 78, *Creditors' Agreements: Nonbankruptcy Alternatives* . Notices of rescission provided for by the Truth in Lending Act are set forth in Ch. 25, *Real Estate Loans* . Home improvement contracts containing provisions giving the buyer a right to cancel the contract are included in Ch. 89, *Home Improvement Contracts* . Sales governed by the Commercial Code are principally discussed in Ch. 52, *Sales of Goods Under the Uniform Commercial Code* .



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PART I. RESEARCH GUIDE

A. Primary Sources

27-77 California Legal Forms--Transaction Guide § 77.01

§ 77.01 California Statutes

[1] Obligations

"Obligation" defined. *Civ. Code § 1427; Code Civ. Proc. § 26.*

How obligations arise. *Civ. Code § 1428; Code Civ. Proc. § 26.*

Joint, several, or joint and several obligations. *Civ. Code §§ 1430, 1431.*

Maturity of obligation subject to condition precedent or concurrent. *Civ. Code § 1439.*

Methods of discharging obligations.

Performance. *Civ. Code § 1473 et seq.*

Offer of performance. *Civ. Code § 1485 et seq.*

Prevention of performance. *Civ. Code § 1511 et seq.*

Accord and satisfaction. *Civ. Code § 1521 et seq.*

Novation. *Civ. Code § 1530 et seq.*

Release. *Civ. Code § 1541 et seq.*

Methods of extinguishing contracts.

Extinction in general. *Civ. Code § 1682.*

Rescission. *Civ. Code § 1688 et seq.*

Modification. *Civ. Code §§ 1697, 1698.*

Cancellation. *Civ. Code §§ 1699-1701, 3412 et seq.*

[2] Performance and Excuse for Nonperformance

Effect of anticipatory breach of obligation by obligor. *Civ. Code § 1440.*

Impossible or unlawful conditions. *Civ. Code § 1441.*

Obligations extinguished by performance. *Civ. Code § 1473.*

Performance of obligation by one jointly liable party. *Civ. Code § 1474.*

Performance of obligation in favor of several persons. *Civ. Code §§ 1475, 1476.*

Effect of partial performance of obligation. *Civ. Code § 1477.*

Rules governing application of performance to more than one obligation to same obligee. *Civ. Code § 1479.*

Obligation extinguished by offer of performance. *Civ. Code § 1485.*

Effect of offer of partial performance. *Civ. Code § 1486.*

Who may make and receive offer of performance. *Civ. Code §§ 1487, 1488.*

Where offer of performance may be made. *Civ. Code § 1489.*

When offer to perform must be made. *Civ. Code §§ 1490, 1491.*

Late offer of performance. *Civ. Code § 1492.*

Good faith offer required. *Civ. Code § 1493.*

Unconditional offer required. *Civ. Code § 1494.*

Requirement that obligor be able and willing to perform in accordance with offer. *Civ. Code § 1495.*

Requirement for delivery of offered performance. *Civ. Code § 1496.*

Character of things tendered in performance. *Civ. Code § 1497.*

Offers made conditional on performance of condition precedent to or concurrent with obligor's performance. *Civ. Code § 1498.*

Obligor's right to receipt for property delivered in performance of obligation. *Civ. Code § 1499.*

Title to thing offered in performance. *Civ. Code § 1502.*

Extinction of obligation for payment of money by offer of payment. *Civ. Code §§ 1500, 1503, 1505.*

Objection to method of performance offered. *Civ. Code § 1501.*

Effect of offer of payment or other performance on interest. *Civ. Code § 1504.*

Excuse when performance or offer of performance is prevented or delayed by obligee's act or operation of law. *Civ.*

Code § 1511(1).

Excuse when performance or offer of performance is prevented by irresistible, superhuman cause. *Civ. Code § 1511(2).*

Excuse when prevention is induced by obligee. *Civ. Code § 1511(3).*

Effect of prevention of performance by creditor. *Civ. Code § 1512.*

Effect of obligee's refusal to accept performance before offer. *Civ. Code § 1515.*

Performance or acceptance under reservation of rights in contracts subject to Commercial Code. *Com. Code § 1308.*

Performance of contracts subject to Commercial Code. *Com. Code § 2501 et seq.*

Manner of tender. *Com. Code § 2503.*

Effect of tender. *Com. Code § 2507.*

Manner of curing improper tender or delivery. *Com. Code § 2508.*

Tender of payment by buyer. *Com. Code § 2511.*

Anticipatory repudiation of contracts subject to Commercial Code. *Com. Code § 2610.*

Retraction of anticipatory repudiation of contracts subject to Commercial Code. *Com. Code § 2611.*

Substituted performance in contracts subject to Commercial Code. *Com. Code § 2614.*

Excuse resulting from failure of condition in contract subject to Commercial Code. *Com. Code § 2615.*

[3] Accord and Satisfaction

"Accord" defined. *Civ. Code § 1521.*

Effect of accord. *Civ. Code § 1522.*

"Satisfaction" defined. *Civ. Code § 1523.*

Accord and satisfaction through part performance. *Civ. Code § 1524.*

When acceptance of check or draft constitutes accord and satisfaction. *Civ. Code § 1526.*

Written instrument presumptive evidence of consideration. *Civ. Code § 1614.*

Satisfaction of judgment. *Code Civ. Proc. § 675.*

Payment of wages conceded to be due in case of dispute; remedies of employee. *Lab. Code § 206.*

[4] Compromise, Settlement, and Release

Release for consideration. *Civ. Code § 1541.*

Release of unknown claims. *Civ. Code § 1542.*

Releases involving joint debtors. *Civ. Code* § 1543.

Contract exempting one from responsibility for fraud, willful injury to another's person or property, or violation of law is against public policy. *Civ. Code* § 1668.

Surety's liability despite release of debtor by creditor. *Civ. Code* § 2824.

Extent of attorney's authority in granting discharge on behalf of client. *Code Civ. Proc.* § 283.

Guardian ad litem's authority to release for ward. *Code Civ. Proc.* §§ 372, 373.5.

Effect of release involving joint debtor or joint tortfeasor. *Code Civ. Proc.* § 877.

Good faith requirement in settlement with one joint tortfeasor or debtor. *Code Civ. Proc.* § 877.6(a).

Discharge of right based on breach of commercial contract. *Com. Code* § 1306.

Release of rights in collateral. *Com. Code* § 9514.

Evidence of attempt to reach compromise inadmissible as evidence of party's liability. *Evid. Code* § 1152(a).

Adult child released from support of parent. *Fam. Code* § 4410 et seq.

Employee's release as to unpaid wages. *Lab. Code* § 206.5.

Forgery of release is crime. *Penal Code* § 470.

Ward's release of guardian on termination of guardianship. *Prob. Code* § 1592.

[5] Account Stated

Statute of limitations for action on account stated. *Code Civ. Proc.* § 337(2).

[6] Novation

Burden of obligation. *Civ. Code* § 1457.

"Novation" defined. *Civ. Code* § 1530.

Methods of novation. *Civ. Code* § 1531.

Applicability of contract rules. *Civ. Code* § 1532.

Rescission of certain novations. *Civ. Code* § 1533.

[7] Modification

Modification of oral contract. *Civ. Code § 1697.*

Modification of written contract. *Civ. Code § 1698.*

Modification of contracts subject to Commercial Code. *Com. Code § 2209.*

[8] Rescission

Methods of rescission; grounds for unilateral rescission. *Civ. Code § 1689.*

Rescission of home solicitation contract. *Civ. Code § 1689.6.*

Procedure for unilateral rescission. *Civ. Code § 1691.*

Relief based on rescission. *Civ. Code § 1692.*

Effect of delay in notice of rescission or in restoration of benefits. *Civ. Code § 1693.*

Rescission of sales contracts. *Com. Code § 2209.*

Effect of cancellation or rescission on claims arising out of antecedent breach. *Com. Code § 2720.*

[9] Cancellation and Termination

Destruction or cancellation of contract. *Civ. Code § 1699.*

Effect of unilateral destruction or cancellation of contract. *Civ. Code §§ 1700, 1701.*

Definition and effect of "termination" on contracts subject to Commercial Code. *Com. Code § 2106(3).*

Definition and effect of "cancellation" on contracts subject to Commercial Code. *Com. Code § 2106(4).*

Effect of cancellation or rescission on claims arising out of antecedent breach in contracts subject to Commercial Code. *Com. Code § 2720.*

Legal Topics:

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

Contracts LawFormationGeneral OverviewContracts LawFormationExecutionContracts LawFormationOffersGeneral OverviewContracts LawTypes of ContractsGeneral Overview



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A. Primary Sources

27-77 California Legal Forms--Transaction Guide §§ 77.02-77.04

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PART I. RESEARCH GUIDE

B. Secondary Sources

27-77 California Legal Forms--Transaction Guide § 77.05

§ 77.05 Law Reviews

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Hillman, *Contract Excuse and Bankruptcy Discharge*, 43 *Stan. L. Rev.* 99 (1990).

Burnham, *Changes in Accord and Satisfaction*, 9 *Cal. Law.* 81 (June 1989).

Gladstone, *Rule 408: Maintaining the Shield for Negotiation in Federal and Bankruptcy Courts*, 16 *Pepp. L. Rev.* 237 (1989).

Gross, *The Changing Face of Mary Carter Agreements in California: The Aftermath of Abbot Ford and Proposition 51*, 16 *Pepp. L. Rev.* 795 (1989).

Legal Topics:

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

Civil ProcedureSettlementsGeneral OverviewCivil ProcedureSettlementsReleases From LiabilityMary Carter AgreementsContracts LawPerformanceGeneral OverviewContracts LawPerformanceAccord & SatisfactionContracts LawTypes of ContractsGeneral Overview



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27-77 California Legal Forms--Transaction Guide § 77.06

§ 77.06 Annotations

[1] Compromise, Settlement, and Release

Annot., What Constitutes Duress by Employer or Former Employer Vitiating Employee's Release of Employer From Claims Arising Out of Employment, 30 A.L.R.4th 294 (1984).

Annot., Effect of Settlement With and Acceptance of Release From One Wrongful Death Beneficiary Upon Liability of Tortfeasor to Other Beneficiaries or Decedent's Personal Representative, 21 A.L.R.4th 275 (1983).

Annot., Modern Status of Rules as to Avoidance of Release of Personal Injury Claim on Ground of Mistake as to Nature and Extent of Injuries, 13 A.L.R.4th 686 (1982).

Annot., Refusal to Pay Debt as Economic Duress or Business Compulsion Avoiding Compromise or Release, 9 A.L.R.4th 942 (1981).

Annot., Prospective Buyer's Release of Prospective Seller From Liability for Injuries Resulting From Trial Use or Inspection of Product for Sale, 93 A.L.R.3d 1296 (1979).

Annot., Validity of Release of Prospective Right to Wrongful Death Action, 92 A.L.R.3d 1232 (1979).

Annot., Validity of Release From Civil Liability Where Release Is Executed by Person While Incarcerated, 86 A.L.R.3d 1230 (1978).

Annot., Release of One Negligently Treating Injury as Affecting Liability of One Originally Responsible for Injury, 64 A.L.R.3d 839 (1975).

Annot., Insurer's Tort Liability for Acts of Adjuster Seeking to Obtain Settlement or Release, 39 A.L.R.3d 739 (1971).

Annot., Release of One Responsible for Injury as Affecting Liability of Physician or Surgeon for Negligent Treatment of Injury, 39 A.L.R.3d 260 (1971).

Annot., Applicability of Parol Evidence Rule in Favor of or Against One Not a Party to Contract of Release, 13 A.L.R.3d 313 (1967).

Annot., Mutual Rescission or Release of Contract as Affecting Rights of Third Party Beneficiary, 97 A.L.R.2d 1262 (1964).

Annot., Manner of Crediting One Tortfeasor With Amount Paid by Another for Release or Covenant Not to Sue, 94 A.L.R.2d 352 (1964).

Annot., Release of (or Covenant Not to Sue) Master or Principal as Affecting Liability of Servant or Agent for Tort, or Vice Versa, 92 A.L.R.2d 533 (1963).

Annot., Avoidance of Release of Personal Injury Claims on Ground of Fraud or Mistake as to Extent or Nature of Injuries, 71 A.L.R.2d 82 (1960).

Annot., Insured's Release of Tortfeasor Before Settlement by Insurer as Releasing Insurer From Liability, 38 A.L.R.2d 1095 (1954).

Annot., Laches as Precluding Cancellation of or Other Relief Against Release for Personal Injuries, 34 A.L.R.2d 1314 (1954).

[2] Account Stated

Annot., Account Stated Based Upon Check or Note Tendered in Payment of Debt, 46 A.L.R.3d 1325 (1972).

Annot., Limitation of Actions as Applied to Account Stated, 51 A.L.R.2d 331 (1957).

Annot., Previous Debtor and Creditor Relationship as Condition of Account Stated, 6 A.L.R.2d 113 (1949).

[3] Novation

Annot., Intention of Parties as Affecting Novation Through Creditor's Acceptance of Obligation of Third Person, 61 A.L.R.2d 755 (1958).

Annot., Necessity of Proof of Original Obligor's Consent to, or Ratification of, Third Person's Assumption of Obligation, in Order to Effect a Novation, 124 A.L.R. 1498 (1940) .

Annot., Accepted Offer to Give or Take Less Than Full Amount of Liquidated Claim as a Novation or an Accord Executory, 96 A.L.R. 1133 (1935) .

Annot., Creditor's Knowledge of, or Consent to, Assumption by Third Person of Debtor's Obligation as Release of Original Debtor or Extinction of Original Debt Essential to Novation, 87 A.L.R. 281 (1933) .

Legal Topics:

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

Civil ProcedureSettlementsGeneral OverviewCivil ProcedureSettlementsReleases From LiabilityGeneral
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27-77 California Legal Forms--Transaction Guide § 77.07

§ 77.07 Text References

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Ch. 8, *Accounts Stated and Open Accounts* .

Ch. 60, *Assignments* .

Ch. 140, *Contracts* .

Ch. 490, *Rescission and Restitution* .

Ch. 520, *Settlement and Release* .

[2] Other Text References

Corbin on Contracts.

Ch. 67, *Performance--Tender--Rescission--Release--Gift--Surrender--Cancellation--Contract Not to Sue* .

Ch. 68, *Discharge by Nonperformance of Condition --Breach--Failure of Consideration--Prevention--Power Reserved--Condition Subsequent* .

Ch. 69, *The Legal Operation of an Executory Accord* .

Ch. 70, *Accord and Satisfaction* .

Ch. 71, *Substituted Contract--Novation* .

Ch. 72, *Account Stated* .

Ch. 74, *Impossibility of Performance--Personal Inability* .

Ch. 75, *Death--Destruction of Specific Things or Conditions--Pro-rating Supply* .

Ch. 76, *Legal Prohibition--Exigencies of War* .

Ch. 77, *Discharge by Frustration of Purpose* .

Ch. 78, *Impossibility of Performance of a Condition--Restitution in Cases of Impossibility* .

Conason, Damages in Tort Actions.

Ch. 82, *Settlements Via Periodic Payments: " Structured"*.

Ch. 83, *Structured Settlements--The Plaintiff's View* .

Miller, Art of Advocacy--Settlement, Ch. 10, *Structured Settlements* .

Legal Topics:

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

Contracts LawPerformanceGeneral OverviewContracts LawPerformanceAccord & SatisfactionContracts

LawPerformanceAssignmentGeneral OverviewContracts LawTypes of ContractsGeneral Overview



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§ 77.10 Governing Law

[1] Obligations Generally

Division 3 of the Civil Code governs contracts and other obligations. More specifically, Title IV of Part One [*Civ. Code § 1473 et seq.*] governs the extinction of obligations and applies to obligations generally, essentially codifying common law rules relating to discharge, except as modified [*see Civ. Code §§ 5, 22.2*]. Those statutes, as augmented and interpreted by case law, are the focus of this chapter.

[2] Contracts for Sale of Goods (UCC Sales)

Division 2 of the Commercial Code, relating to sales, applies to "transactions in goods" [*Com. Code § 2102*], in other words, sale contracts. "Goods" is broadly defined to include all things that are moveable at the time of identification to the contract, other than money, investment securities, and things in action [*see Com. Code § 2105(1)*].

The Commercial Code is supplemented by the general principles of law and equity unless the latter are displaced by particular provisions [*Com. Code § 1103*]. In the area of discharge of obligations, the Commercial Code does significantly vary from the Civil Code provisions applicable to obligations generally. For example, the Commercial Code contains its own definitions of "termination" and "cancellation" of contracts [*see Com. Code § 2106(3), (4)*], its own rules governing manner of performance and related matters [*see Com. Code § 2501 et seq.*], and its own provisions governing breach, repudiation, and excuse [*see Com. Code § 2601 et seq.*]. Perhaps the most significant Commercial Code provision from the point of view of this chapter is *Com. Code § 2209*, which governs the modification and rescission of contracts and includes the rule that an agreement modifying a contract subject to Division 2 needs no consideration in order to be binding [*Com. Code § 2209(1)*]. The latter rule differs substantially from that applicable to contracts generally [*see § 77.21[4]*].

Contracts subject to the Commercial Code are the focus of Ch. 52, *Sales of Goods Under the Uniform Commercial Code*. Accordingly, this chapter focuses on the law applicable to obligations generally, rather than on the special rules of the Commercial Code, which are noted in this chapter only insofar as they significantly differ from the general rules governing discharge of obligations. The forms in this chapter may be used in connection with the discharge of obligations under UCC sales contracts as well as other obligations. However, modifications may be necessary or

desirable in some cases. For example, the recitals of consideration in the modification and rescission agreements may be deleted without affecting their validity.

Legal Topics:

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

Commercial Law (UCC)Sales (Article 2)General OverviewCommercial Law (UCC)Sales (Article 2)Form, Formation & ReadjustmentGeneral Overview



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§ 77.11 Obligations

[1] In General

An "obligation" is a legal duty that binds a person to do or not to do a particular thing [*Civ. Code § 1427; Code Civ. Proc. § 26*]. Obligations arise from contracts or by operation of law [*Civ. Code § 1428; Code Civ. Proc. § 26*]. An obligation that arises by operation of law is enforced in a civil action or in the manner specified by law [*Civ. Code § 1428*].

If an obligation is imposed on more than one person, it may be joint, several, or joint and several [*Civ. Code § 1430*] and is presumed to be joint rather than several unless there are express words to the contrary [*see Civ. Code § 1431*]. If an obligation is subject to a condition precedent imposed on the other party, it does not mature and its performance cannot be required until the condition precedent is fulfilled. If the obligation is subject to a condition concurrent, performance cannot be required unless the other party is able, and offers, to fulfill the condition [*Civ. Code § 1439; see, e.g., Wiz Technology, Inc. v. Coopers & Lybrand LLP (2003) 106 Cal. App. 4th 1, 11-14, 130 Cal. Rptr. 2d 263* (auditor's resignation was justified by client's breach of material condition which required hiring different securities counsel)].

[2] Methods of Discharging Obligations

The methods of discharging obligations described in this chapter include those designated by the Civil Code as means of extinguishing either obligations or contracts. An obligation may be extinguished by any of the following methods:

- Performance [*Civ. Code § 1473 et seq.; see § 77.12*].
- Offer (tender) of performance [*Civ. Code § 1485 et seq.; see § 77.13*].
- Prevention of performance or offer [*Civ. Code § 1511 et seq.; see § 77.14*].
- Accord and satisfaction [*Civ. Code § 1521 et seq.; see § 77.16*].

- Novation [*Civ. Code § 1530 et seq.; see § 77.20*].

- Release [*Civ. Code § 1541 et seq.; see § 77.18*].

A contract, like any other obligation, may be extinguished by any of the methods stated above [*Civ. Code § 1682*]. In addition, a contract can be extinguished by any of the following:

- Rescission [*Civ. Code § 1688 et seq.; see § 77.22*];

- Modification [*Civ. Code §§ 1697, 1698; see § 77.21*]; or

- Cancellation [*Civ. Code §§ 1699-1701, 3412 et seq.; see § 77.23*].

A contract or obligation also can be discharged by means of an "account stated," that is, an agreement that a stated sum will be paid and accepted in discharge of an obligation [*see § 77.19*], or by a compromise or compromise and settlement agreement [*see § 77.17*].

When a contract is assigned, and the assignor intends to extinguish his or her obligation, this requires the consent of the other party [*Civ. Code § 1457*]. For a consent form that may be used for this purpose, see Ch. 76, *Assignment of Obligations*.

Legal Topics:

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

Commercial Law (UCC)Sales (Article 2)General OverviewCommercial Law (UCC)Sales (Article 2)Contract TermsGeneral Overview



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§ 77.12 Discharge Through Performance

[1] In General

Full performance of an obligation, whether by the person having the duty to perform (the "obligor") or by any other person on the obligor's behalf and with the obligor's consent, extinguishes the obligation, if that performance is accepted by the other party (the "obligee") [*Civ. Code § 1473*]. When the obligor has more than one obligation to an obligee, special rules determine how the tendered performance is to be applied to those obligations [*see Civ. Code § 1479*]. In most cases involving payments when there are several obligations, the payment will be partial, rather than in full. For discussion of the rules and the effect of partial payment, and a form to use to specify the order of application, see § 77.211.

An obligor has a right to require a receipt for any property delivered to the obligee in performance of the obligation [*Civ. Code § 1499; see § 77.200* (receipt for performance)].

Performance can be excused in certain circumstances [*Civ. Code § 1511; see § 77.14*].

The Commercial Code prescribes different rules governing the performance of contracts for sales of goods [*see Com. Code § 2501 et seq.; see Ch. 52, Sales of Goods Under the Uniform Commercial Code*].

[2] Joint Obligations

The performance of an obligation by one of several persons who are jointly liable extinguishes the liability of all of them [*Civ. Code § 1474*]. A contract obligation in favor of several persons is extinguished by performance rendered to any of them [*Civ. Code § 1475*]. The manner of performance may be directed by the obligee or any joint obligee, and if performance is rendered in the manner directed, the obligation is extinguished even if the obligee does not receive its benefit [*Civ. Code § 1476*].

[3] Partial Performance

Partial performance of an indivisible obligation will extinguish the corresponding proportion of the obligation if the

obligee voluntarily retains the benefit of that partial performance. However, if it is of such a nature that the obligee cannot avoid retaining it without injuring his or her own property, retention is not presumed to be voluntary [*Civ. Code* § 1477].

Legal Topics:

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

Commercial Law (UCC)Sales (Article 2)PerformanceGeneral OverviewCommercial Law (UCC)Negotiable Instruments (Article 3)Discharge & PaymentDischargeContracts LawPerformanceGeneral OverviewContracts LawPerformanceDischarges & TerminationsContracts LawSales of GoodsGeneral Overview



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§ 77.13 Discharge Through Offer of Performance

[1] In General

An obligation can be extinguished by an offer of full performance made with intent on the part of the obligor to extinguish the obligation [*Civ. Code* §§ 1485, 1486]. The statutory term "offer of performance" is equivalent to "tender" [see *Still v. Plaza Marina Commercial Corp.* (1971) 21 Cal. App. 3d 378, 385, 98 Cal. Rptr. 414]. When properly made, the effect of a valid tender or offer of performance is to place the other party in default if that party refuses to accept it [*Still v. Plaza Marina Commercial Corp.* (1971) 21 Cal. App. 3d 378, 385, 98 Cal. Rptr. 414], thus permitting the party making the tender to exercise the available remedies for breach of contract [*Walker v. Houston* (1932) 215 Cal. 742, 745, 12 P.2d 952].

Contracts for the sale of goods are governed by rules that have a similar effect. Wrongful rejection of goods by the buyer is a breach of the contract and permits the seller to pursue remedies, including damages for nonacceptance and termination of the contract [see *Com. Code* § 2703; Ch. 52, *Sales of Goods Under the Uniform Commercial Code*].

[2] Conditions of Offer

The offer must be an offer of full performance. An offer of partial performance has no effect [*Civ. Code* § 1486].

An offer of performance must be made in good faith. Moreover, it must be made in a manner that is most likely, in the circumstances, to benefit the obligee [*Civ. Code* § 1493]. It must be unconditional, that is, without any demand that the obligee perform or agree to any conditions that the obligee is not already obligated to perform [*Civ. Code* § 1494]. However, if the obligor is entitled to the performance of a condition precedent or concurrent, the offer may be made conditional on performance of that condition [*Civ. Code* § 1498].

[3] Delivery of Thing Offered

The obligor must be able and willing to perform in accordance with the offer [*Civ. Code* § 1495]. However, whatever is to be delivered need not actually be produced on an offer of performance unless the offer is accepted [*Civ. Code* § 1496]. If something is offered as part of the tendered performance, it must not be so mixed with other things that it

cannot be separated immediately and without difficulty [*Civ. Code* § 1497]. The title to anything offered in performance of the obligation passes to the obligee if the obligor's intention to that effect is stated at the time [*Civ. Code* § 1502].

If the obligation is for the payment of money, the obligation is extinguished by an offer of payment. The offer must be accompanied by deposit of the amount due in the obligee's name in a bank or savings and loan association, and notice of the deposit must be given to the obligee [*Civ. Code* § 1500]. If anything other than money is offered in performance of the obligation, and the obligor means to treat it as belonging to the obligee, the obligor must retain it as if he or she were a depositary for hire until the obligee accepts it or until the obligor gives the obligee reasonable notice that he or she will retain it no longer. If the obligor has offered to retain the property, he or she must do so until it has been deposited with a suitable depositary if one can be found with reasonable diligence [*Civ. Code* § 1503].

If property is delivered to the obligee as a means of performance, and the obligee refuses to accept it as such, he or she is not bound to return it unless the obligor demands it. However, if the property is retained, the obligee becomes a gratuitous depositary [*Civ. Code* § 1505]. When delivery is completed, the obligor has a right to a receipt for it [*Civ. Code* § 1499; *Code Civ. Proc.* § 2075; see § 77.200[2] (receipt for performance)]. For discussion of the law governing deposits, see Ch. 102, *Bailments* .

For purposes of sale contracts governed by the Commercial Code, tender of delivery requires that the seller put and hold conforming goods at the buyer's disposition and give the buyer any notification reasonably necessary for the buyer to take delivery [*Com. Code* § 2503(1)]. Special rules govern the time and manner of tender [see *Com. Code* §§ 2503, 2504, 2511 (tender of delivery by seller and tender of payment by buyer)]. Tender of delivery is a condition to the buyer's duty to accept goods and, unless otherwise agreed, the buyer's duty to pay for them [*Com. Code* § 2507(1)]. Conversely, tender of payment is a condition to the seller's duty to tender and complete any delivery [*Com. Code* § 2511(1)]. For discussion of contracts for the sale of goods, see Ch. 52, *Sales of Goods Under the Uniform Commercial Code* .

[4] Effect of Offer on Obligation

A duly made offer of payment or other performance stops the running of interest on the obligation and all other incidents of the obligation, even if the title to the property offered is not transferred to the obligee [*Civ. Code* § 1504].

[5] Who Makes and Receives Offer

The offer of performance must be made by the obligor or someone acting on his or her behalf with the obligor's consent [*Civ. Code* § 1487]. It must be made to the obligee (or any joint obligee) or an authorized person [*Civ. Code* § 1488].

[6] Where Offer May Be Made

In the absence of any express contract provision to the contrary, the obligor may make an offer of performance at any of the following places [*Civ. Code* § 1489]:

- The place required by the obligee.
- Wherever the obligee or agent can be found.
- If the obligee or agent cannot, with reasonable diligence, be found within California and within a reasonable distance from his or her residence or place of business, or if that person evades the obligor: at the residence or place of business if it can be found within California.
- If the offer cannot be made at any of the above locations, then at any place within California.

[7] When Offer Must Be Made

If the contract sets a time for performance, the offer to perform must be made at that time. The offer must be made within reasonable hours and may not be made before or after the set time [*Civ. Code § 1490*]. If the contract does not set a time for performance, and the obligor has not yet refused to perform in the face of a reasonable demand for performance, the offer may be made at any time [*Civ. Code § 1491*]. If time has not expressly been declared to be of the essence of the contract, and a delay in performance is capable of exact compensation, an offer or performance accompanied by an offer of that compensation may be made at any time after performance is due. Such an offer will not prejudice any rights that were acquired by the obligee or any other person in the interim period [*Civ. Code § 1492*].

[8] Offer Made After Performance Is Due

An offer of performance, accompanied by an offer of compensation for delay, may be made at any time after performance is due. However, the delay must be capable of exact and full compensation, and the contract must not include a time-of-the-essence provision. Moreover, any such offer is without prejudice to any rights acquired by the obligee or any other party in the meantime [*Civ. Code § 1492*].

[9] Waiver of Objections by Obligee

If the obligee objects to the method of performance offered by the obligor, all objections that can be cured must be stated immediately at the time of the offer if the obligee has an opportunity to do so. If not timely stated, those objections are waived [*Civ. Code § 1501*].

Legal Topics:

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

Commercial Law (UCC)Sales (Article 2)PerformanceGeneral OverviewCommercial Law (UCC)Negotiable Instruments (Article 3)Discharge & PaymentDischargeContracts LawPerformanceGeneral OverviewContracts LawPerformanceDischarges & Terminations



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PART II. LEGAL BACKGROUND

27-77 California Legal Forms--Transaction Guide § 77.14

§ 77.14 Excuse for Lack of Performance or Offer of Performance

[1] In General

The lack of performance or an offer of performance, or any delay in either, is excused in specified circumstances [see [2]-[4], *below*]. However, these only excuse the obligor to the extent to which the cause operates [*Civ. Code § 1511*]. If performance is prevented by an obligee, the obligor is entitled to all of the benefits of the contract that would have obtained if it had been performed by both parties [*Civ. Code § 1512*]. If performance is prevented by any other cause, the obligor is entitled to a proportion of the consideration to which he or she would have been entitled on full performance, measured by the benefits that the obligee receives from the actual performance [*Civ. Code § 1514*].

In the case of a contract for the sale of goods, which is subject to Division 2 of the Commercial Code, the seller may withhold performance if the buyer wrongfully rejects or revokes acceptance of goods, fails to make a payment due on or before delivery, or repudiates all or part of the contract [see *Com. Code § 2703(a), (b)*; see also *Com. Code § 2711* (buyer's remedies)]. Other special rules also apply to these contracts [see, e.g., *Com. Code §§ 2615, 2616* (excuse based on failure of condition)]. For further discussion, see Ch. 52, *Sales of Goods Under the Uniform Commercial Code*.

[2] Prevention by Obligee or Operation of Law

Lack of performance or an offer of performance, or any delay in either, is excused when the performance or offer is prevented or delayed by the obligee's act or by operation of law, even if the contract provides that neither constitutes an excuse. Even though such a waiver is of no effect, the contract may still require that the obligor give written notice, within a reasonable time after occurrence of the event excusing performance, of his or her intention to claim a time extension, bring suit, or otherwise rely on this type of excuse [*Civ. Code § 1511(1)*].

[3] Prevention Induced by Obligee

Lack of performance or of an offer of performance, or any delay in either, is excused when the obligor is induced not to perform or offer to perform by any act of the obligee that is intended or naturally tends to have that effect. This rule operates when the obligee's action is taken at or before the time the performance or offer may be made and is not rescinded before that time [*Civ. Code § 1511(3)*].

[4] Prevention by Superhuman Causes or Public Enemy

Lack of performance or an offer of performance, or any delay in either, is excused when performance or the offer of performance is prevented by an irresistible, superhuman cause ("act of God"), or by the act of public enemies of California or the United States. However, the contract may expressly invalidate this type of excuse [*Civ. Code* § 1511(2)].

[5] Prevention by Impossibility

Nonperformance of a contractual obligation is excused when performance has become impossible and beyond the control of the party obligated to give the performance [*see Oosten v. Hay Haulers Etc. Union* (1955) 45 Cal. 2d 784, 789, 291 P.2d 17]. For purposes of this doctrine, performance must be "impossible in the nature of things," not merely in the obligor's abilities [*see Civ. Code* § 1597]. Examples of impossibility include death of an obligor on whom a particular personal obligation was placed [*Potts Drug Co. v. Benedict* (1909) 156 Cal. 322, 104 P. 432], operation of law [*see Civ. Code* § 1511], acts of war [*see Civ. Code* § 1511], and destruction of the subject matter of the contract [*see Potts Drug Co. v. Benedict* (1909) 156 Cal. 322, 104 P. 432]. A party invoking this impossibility rule must show that he or she made reasonable efforts to overcome the obstacles preventing performance [*Oosten v. Hay Haulers Etc. Union* (1955) 45 Cal. 2d 784, 789, 291 P.2d 17].

[6] Prevention by Impracticability

A failure to perform may be excused when performance has become unreasonably difficult or expensive because of unforeseeable circumstances [*see Mineral Land Park Co. v. Howard* (1916) 172 Cal. 289, 293, 156 P. 458]. However, laws or governmental acts that merely make performance unprofitable or more difficult or expensive do not excuse the duty to perform [*Lloyd v. Murphy* (1944) 25 Cal. 2d 48, 55, 153 P.2d 47].

[7] Prevention by Frustration of Purpose

Lack of performance may be excused under the doctrine of frustration of purpose. While similar to the doctrine of impossibility, this doctrine relies on a failure of consideration. When an unforeseeable event supervenes to cause the practically total destruction of the expected value of performance, performance is excused even though it might still technically be possible [*Autry v. Republic Productions, Inc.* (1947) 30 Cal. 2d 144, 148, 180 P.2d 888]. Frustration of purpose may result, for instance, from intervention of war [*see Lloyd v. Murphy* (1944) 25 Cal. 2d 48, 153 P.2d 47] and destruction of property related to the main purpose of the contract [*see La Cumbre G. & C. Club v. Hotel Co.* (1928) 205 Cal. 422, 271 P. 476].

Legal Topics:

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

Commercial Law (UCC)Sales (Article 2)PerformanceGeneral OverviewContracts LawPerformanceGeneral Overview



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27-77 California Legal Forms--Transaction Guide § 77.15

§ 77.15 Anticipatory Breach

[1] Obligor's Refusal to Accept Performance Before It Is Offered

If an obligor refuses to accept performance before the performance is offered, that refusal is treated as if there had been an offer of performance that had been refused. This rule does not apply if, before performance is actually due under the contract, the obligor notifies the obligee of his or her willingness to accept performance [*Civ. Code § 1515; see Com. Code §§ 2610, 2611* (rules governing anticipatory repudiation in sales of goods)].

[2] Obligor's Refusal to Perform

If an obligor notifies an obligee that he or she will not perform the obligation, the obligee is entitled to enforce the obligation without previously performing or offering to perform his or her own contract obligations. This rule operates unless the obligor retracts the notice of anticipatory breach before his or her performance is due [*Civ. Code § 1440*].

Legal Topics:

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

Contracts LawBreachAnticipatory RepudiationGeneral OverviewContracts LawSales of GoodsBreach, Repudiation & ExcuseAcceptance of GoodsNotice of BreachContracts LawSales of GoodsBreach, Repudiation & ExcuseAnticipatory Repudiation & Constructive Breach



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27-77 California Legal Forms--Transaction Guide § 77.16

§ 77.16 Accord and Satisfaction

[1] Definitions

An accord (sometimes referred to as an executory accord) is an agreement by an obligee to accept, in extinction of an obligation, something different from or less than that to which the obligee is entitled [*Civ. Code § 1521*]. Satisfaction is acceptance by the obligee of the consideration specified in the accord. It is satisfaction that extinguishes the obligation [*Civ. Code § 1523*]. For discussion of the essential elements of an accord and satisfaction, see [6], *below*. For accord and satisfaction agreements, see §§ 77.220-77.222. For an endorsement to use on a check to indicate accord and satisfaction, see § 77.230[2].

[2] Distinguished From Executory Accord

The fact that the parties have reached an accord does not mean that the original obligation has been extinguished. Although an accord binds the parties, it does not extinguish the original obligation until the accord is fully performed by the parties [*Civ. Code § 1522*]. In other words, an accord does not extinguish the original obligation until there has been satisfaction, that is, acceptance of the consideration agreed on. Neither an offer to perform nor an actual tender of the performance specified in the accord, without acceptance of that performance, will support the defense that there has been an accord and satisfaction that extinguishes the original contract obligation [see *Silvers v. Grossman* (1920) 183 Cal. 696, 699, 192 P. 534] .

[3] Distinguished From Release

Satisfaction is acceptance of compensation, while a release is a surrender of a cause of action [*Mesler v. Bragg Management Co.* (1985) 39 Cal. 3d 290, 298, 216 Cal. Rptr. 443, 702 P.2d 601] . Thus, if the circumstances of an accord and satisfaction indicate a need for further protection of the party giving the satisfaction, that party should also demand a release from further liability.

[4] Compared With Compromise and Settlement

A compromise is a settlement of differences by mutual concessions; an adjustment of conflicting claims [*Isaacson v.*

City of Oakland (1968) 263 Cal. App. 2d 414, 421, 69 Cal. Rptr. 379]. An accord is an agreement by an obligee to accept something different from or less than that to which the obligee is entitled, in extinction of an obligation [Civ. Code § 1521]. Thus, in either case a preexisting claim is settled through substituted performance. One difference between the two in California is that a compromise and settlement can result in discharge of an obligation through substitution of another obligation (which is to say, through a novation or a modification) [see *Armstrong v. Sacramento Valley R. Co.* (1919) 179 Cal. 648, 651, 178 P. 516], while in the case of an accord and satisfaction, only the obligee's acceptance of the consideration specified in the accord will constitute the satisfaction that extinguishes the obligation [Civ. Code § 1523]. Another difference is that a compromise and settlement comes into play only when there is a difference between the parties with respect to the obligation and mutual concessions are made, while accord and satisfaction does not necessarily require concession on the part of the obligor.

[5] Distinguished From Novation

In an accord and satisfaction, it is not the new promise, but the performance of that new promise, that is accepted in lieu of the existing claim [*Gardiner v. Gaither* (1958) 162 Cal. App. 2d 607, 620-621, 329 P.2d 22; see Civ. Code § 1523]. In a novation, on the other hand, one obligation is extinguished when the obligee accepts another for it, that is, when the new promise is substituted for the obligee's existing claim [see § 77.20[1], [2]]. Thus, the essential distinction is that accord and satisfaction involves the settlement of the original obligation or promise through performance of a new one, while novation involves substitution of one obligation or promise for another without performance.

[6] Essential Elements of Accord and Satisfaction

[a] In General

An "accord" is an agreement [Civ. Code § 1521]. Thus, the principles that govern contracts are applicable [*Moving Picture etc. Union v. Glasgow Theaters, Inc.* (1970) 6 Cal. App. 3d 395, 403, 86 Cal. Rptr. 33]. These concern competent parties, their consent (that is, a meeting of the minds), a lawful object (that is, proper subject matter), and consideration [Civ. Code § 1550; *Republic Indem. Co. v. Maier Brewing Co.* (1967) 249 Cal. App. 2d 495, 499, 57 Cal. Rptr. 670].

[b] Proper Subject Matter

Any obligation may be the subject of an accord and satisfaction, provided the applicable requirements are satisfied. This obviously includes disputed obligations (in which case, settlement of the dispute constitutes consideration for the accord [see [c], [e], below]), but it also includes undisputed obligations in certain circumstances [*Schwartz v. Cal. Claim Service* (1942) 52 Cal. App. 2d 47, 52-53, 125 P.2d 883; Civ. Code § 1524; see [g], below]. An "obligation" is a legal duty that binds a person to do or not to do a particular thing [Civ. Code § 1427; Code Civ. Proc. § 26].

An accord and satisfaction cannot be used to coerce the settlement of an obligation legally due under a statute. Thus, for example, in a dispute over wages, *Lab. Code* § 206 requires unconditional payment of the amounts that the employer concedes are due. Accordingly, offer and acceptance of the wages due could not constitute an accord and satisfaction with respect to wages in dispute. Once the wages due are unconditionally paid, however, the employer and employee are free to compromise the disputed amount [see *Reid v. Overland Machined Products* (1961) 55 Cal. 2d 203, 207-208, 10 Cal. Rptr. 819, 359 P.2d 251].

[c] Existence of Dispute as a Factor

While it has been stated that a dispute (or a bona fide dispute) as to the amount due is an essential element of an accord and satisfaction [see *Republic Indem. Co. v. Maier Brewing Co.* (1967) 249 Cal. App. 2d 495, 499, 57 Cal. Rptr. 670 (dictum); see also *Moving Picture etc. Union v. Glasgow Theaters, Inc.* (1970) 6 Cal. App. 3d 395, 403, 86 Cal. Rptr. 33 (dictum)], in fact Civ. Code § 1521 contains no such specific requirement. Nevertheless, the existence or

nonexistence of a dispute is typically the key factor in determining whether there is consideration for the accord [see *Schwartz v. Cal. Claim Service* (1942) 52 Cal. App. 2d 47, 54-55, 125 P.2d 883 ; see also [e], below].

[d] Meeting of Minds

An accord and satisfaction is not valid unless it is the result of an express or implied meeting of the minds [*Southern Cal. Disinfecting Co. v. Lomkin* (1960) 183 Cal. App. 2d 431, 442, 7 Cal. Rptr. 43] . There can be no accord and satisfaction unless there is an agreement that one party has accepted something different from or less than the amount due and the parties intend the sum paid to be accepted in extinction of the amount due [Civ. Code § 1521; *Southern Cal. Disinfecting Co. v. Lomkin* (1960) 183 Cal. App. 2d 431, 442-443, 7 Cal. Rptr. 43] . Therefore, an accord and satisfaction will not extinguish claims that were not within the contemplation of the parties when the accord was made. For example, acceptance of a check containing a general "release" clause added by the drawer, without disclosure of the drawer's fraud arising out of the subject matter of the release clause, did not constitute an accord and satisfaction with respect to the drawer's fraud and the ensuing damages, since there was no meeting of the minds with respect to the satisfaction of that claim [*Southern Cal. Disinfecting Co. v. Lomkin* (1960) 183 Cal. App. 2d 431, 443, 7 Cal. Rptr. 43] .

Acceptance of a check with accord and satisfaction language written on it does not create an accord and satisfaction if acceptance was inadvertent or without knowledge of the restriction [Civ. Code § 1526(a); see Civ. Code § 1526; Com. Code § 1308; § 77.230[1][d]].

For additional discussion of the requirement that there be a meeting of the minds (consent), see Ch. 75, *Formation of Contracts and Standard Contractual Provisions* .

[e] Consideration for Accord and Satisfaction

An accord and satisfaction, like any other valid contract, requires consideration in order to be binding [*Western Concrete Structures Co. v. James I. Barnes Constr. Co.* (1962) 206 Cal. App. 2d 1, 7, 23 Cal. Rptr. 506 ; see Civ. Code § 1550]. Consideration is any benefit that the promisee or any other person confers on the promisor or agrees to confer on the promisor when the promisor is not already lawfully entitled to it. Consideration also includes any prejudice the promisor suffers or agrees to suffer other than what, at the time of consent, the promisor is lawfully bound to suffer. Either constitutes good consideration if it is an inducement to the promisor [Civ. Code § 1605].

When a claim is disputed or unliquidated, the fact that the dispute has been resolved constitutes consideration for an accord and satisfaction [*Potter v. Pacific Coast Lumber Co.* (1951) 37 Cal. 2d 592, 602, 234 P.2d 16 ; see *Robertson v. Robertson* (1939) 34 Cal. App. 2d 113, 118, 93 P.2d 175] . When an obligor pays less than the amount of an undisputed obligation, there is no consideration to support a common law accord and satisfaction [see *Western Concrete Structures Co. v. James I. Barnes Constr. Co.* (1962) 206 Cal. App. 2d 1, 8, 23 Cal. Rptr. 506 ; *MacIsaac & Menke Co. v. Cardox Corp.* (1961) 193 Cal. App. 2d 661, 670-671, 14 Cal. Rptr. 523] . However, the absence of consideration in the case of an undisputed obligation is overcome in certain circumstances [see [g], below].

For discussion of consideration, see Ch. 75, *Formation of Contracts and Standard Contractual Provisions* .

[f] Bona Fide Dispute as Element of Consideration

The resolution of a dispute can constitute sufficient consideration for an accord and satisfaction if the dispute is bona fide [*B. & W. Engineering Co. v. Beam* (1913) 23 Cal. App. 164, 170, 137 P. 624] . This issue is determined by inquiring not whether there is a solid foundation for the dispute, but whether the dispute was "honest" or "fraudulent" [*Potter v. Pacific Coast Lumber Co.* (1951) 37 Cal. 2d 592, 597, 234 P.2d 16 ; see *Connecticut Printers, Inc. v. Gus Kroesen, Inc.* (1982) 134 Cal. App. 3d 54, 61, 184 Cal. Rptr. 436 (common law rule not abrogated by former Com.

Code § 1207; now see Com. Code § 1308]). An arbitrary refusal to pay, based on the mere pretense of the debtor, made for the obvious purpose of exacting terms that are inequitable and oppressive, is not a dispute that will satisfy this rule [*Berger v. Lane* (1923) 190 Cal. 443, 448, 213 P. 45 ; *Kelly v. David D. Bohannon Organization* (1953) 119 Cal. App. 2d 787, 792-795, 260 P.2d 646 (no accord and satisfaction given substantial evidence that there was no bona fide dispute)]. However, if the parties to an accord and satisfaction have met on equal terms, without fraud, misrepresentation, or mistake, and have adjusted existing differences, the courts may not go behind the settlement for the purposes of ascertaining which of the parties was right in the controversy [*B. & W. Engineering Co. v. Beam* (1913) 23 Cal. App. 164, 171, 137 P. 624] .

[g] Partial Performance Exception to Consideration Requirement

The common law rule was that in the absence of a dispute with regard to the amount due, payment of a lesser amount in satisfaction of the claim was not sufficient consideration to support an accord and satisfaction [*Schwartz v. Cal. Claim Service* (1942) 52 Cal. App. 2d 47, 52-53, 125 P.2d 883] . However, in California, part performance of an obligation, either before or after its breach, will extinguish that obligation when expressly accepted in satisfaction by the obligee in writing, even though there is no new consideration [*Civ. Code § 1524*]. Even an undisputed obligation may be discharged [*Petroleum Collections, Inc. v. Sulser* (1968) 70 Cal. Rptr. 537] .

Legal Topics:

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

Contracts LawPerformanceGeneral OverviewContracts LawPerformanceAccord & Satisfaction



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27-77 California Legal Forms--Transaction Guide § 77.17

§ 77.17 Compromise and Settlement Agreements

[1] Definition

A compromise and settlement, as it is known in California, is a settlement of differences or adjustment of conflicting claims by mutual concessions. The term does not include the discussions or negotiations that lead to the compromise and settlement agreement [*Isaacson v. City of Oakland* (1968) 263 Cal. App. 2d 414, 421, 69 Cal. Rptr. 379] . An agreement that results from a compromise and settlement may be referred to as a "compromise agreement" [see, e.g., *Armstrong v. Sacramento Valley R. Co.* (1919) 179 Cal. 648, 650, 178 P. 516 (reference to compromise and settlement as "agreement of compromise")] or a "settlement agreement." A compromise agreement is similar to an accord and satisfaction; however, there are some distinctions between the two. For discussion of the differences, see § 77.16[4].

Special considerations apply when a compromise or settlement agreement is entered into with one or more, but not all, of a number of joint obligors. For discussion of these considerations, see § 77.18[5].

A simple compromise agreement is set forth in § 77.260[2]. For a structured settlement agreement, see § 77.262[2]. A sliding scale settlement agreement is illustrated in § 77.263[2]. For discussion of the use of compromise or settlement agreements during the course of litigation, and their effect, see California Forms of Pleading and Practice, Ch. 520, *Settlement and Release* (Matthew Bender).

[2] Nature and Legal Effect

A compromise agreement is a new contract [*Armstrong v. Sacramento Valley R. Co.* (1919) 179 Cal. 648, 650, 178 P. 516] and is governed by general contract principles [*Distefano v. Hall* (1968) 263 Cal. App. 2d 380, 385, 69 Cal. Rptr. 691] . It is binding on the parties, becomes the measure of the parties' rights [*Argonaut Ins. Exchange v. Industrial Acci. Com.* (1958) 49 Cal. 2d 706, 711, 321 P.2d 460 (stating general rule but holding that legislative intent in enacting Labor Code provision prevailed under facts of case)], and extinguishes the prior obligation [see *Armstrong v. Sacramento Valley R. Co.* (1919) 179 Cal. 648, 651, 178 P. 516] . It has many of the attributes of a judgment and, in the absence of fraud or undue influence, decides the rights of the parties and operates as a bar to the reopening of the original controversy [*County of Los Angeles v. Law Bldg. Corp.* (1967) 254 Cal. App. 2d 848, 853, 62 Cal. Rptr. 542] .

The courts uphold compromise agreements because it is the policy of the law to discourage litigation and to favor compromises and voluntary settlements of doubtful rights and controversies, made either in or out of court [*Holbrook v. Telesio* (1964) 225 Cal. App. 2d 152, 156, 37 Cal. Rptr. 153] . This is the case even when the agreement serves only to narrow the issues to be tried [*LaBorde v. McKesson & Robbins, Inc.* (1968) 264 Cal. App. 2d 363, 372, 70 Cal. Rptr. 726] .

[3] Matters Covered

A compromise agreement covers only the matters clearly comprehended by the parties and the necessary consequences of those matters [*Shriver v. Kuchel* (1952) 113 Cal. App. 2d 421, 425-426, 248 P.2d 35] . It does not include matters that were never intended to be included by the parties [*Shriver v. Kuchel* (1952) 113 Cal. App. 2d 421, 426, 248 P.2d 35] . Thus, for example, a compromise agreement entered into during litigation does not bar matters incident to the resulting judgment, such as costs and attorneys' fees, that were not part of the underlying cause of action, unless those matters are covered by the agreement [*Folsom v. Butte County Assn. of Governments* (1982) 32 Cal. 3d 668, 677-678, 186 Cal. Rptr. 589, 652 P.2d 437] .

[4] Distinguished From Release

A compromise agreement is governed by contract principles [*Distefano v. Hall* (1968) 263 Cal. App. 2d 380, 385, 69 Cal. Rptr. 691] , including a requirement of consideration [see § 77.17[6][d]], and, in general, bars the reopening of the original controversy [*County of Los Angeles v. Law Bldg. Corp.* (1967) 254 Cal. App. 2d 848, 853, 62 Cal. Rptr. 542] . In contrast, a release is not a new contract; it is the abandonment or relinquishment of a claim [see *Pellet v. Sonotone Corp.* (1945) 26 Cal. 2d 705, 711, 160 P.2d 783] , which extinguishes the underlying obligation [Civ. Code § 1541]. Moreover, unlike a compromise agreement, consideration is not a necessary prerequisite for a written release [Civ. Code § 1541; see *Worthington v. State Bd. of Control* (1968) 266 Cal. App. 2d 697, 699-700, 72 Cal. Rptr. 449] . For further discussion of releases, see § 77.18.

[5] Use of Release With Compromise Agreement

A release is commonly used in conjunction with a compromise agreement [see, e.g., *Argonaut Ins. Exchange v. Industrial Acci. Com.* (1958) 49 Cal. 2d 706, 710-711, 321 P.2d 460 ; *Gregory v. Hamilton* (1978) 77 Cal. App. 3d 213, 217-220, 142 Cal. Rptr. 563] . This has the dual effect of a relinquishment of the claim by means of the release [see *Pellet v. Sonotone Corp.* (1945) 26 Cal. 2d 705, 711, 160 P.2d 783] and a bar to the reopening of the claim through the compromise agreement [*County of Los Angeles v. Law Bldg. Corp.* (1967) 254 Cal. App. 2d 848, 853, 62 Cal. Rptr. 542] . The settlement forms in this chapter mirror the general practice in California of combining the compromise agreement with a release [see §§ 77.260-77.263].

[6] Essential Elements of Compromise Agreements

[a] In General

Compromise agreements are governed by the principles applicable to contracts generally [*Distefano v. Hall* (1968) 263 Cal. App. 2d 380, 385, 69 Cal. Rptr. 691] , namely, competent parties, consent of the parties (a meeting of the minds), a lawful object, and consideration [Civ. Code § 1550].

When a compromise agreement is entered into with fewer than all of a number of joint tortfeasors, there is a requirement of good faith [Code Civ. Proc. § 877.6; see § 77.18[5][c]]. The requirement that there be a good faith settlement applies to compromises with other co-obligors as well as with joint tortfeasors [see Code Civ. Proc. §§ 877, 877.6(a); § 77.18[5][c]]. For discussion of the effect of a release given in a compromise with joint debtors or joint tortfeasors, see § 77.18[5][a].

[b] Parties

Compromise agreements affect only the parties to the agreement, or those in privity with them [*Holbrook v. Telesio* (1964) 225 Cal. App. 2d 152, 155, 37 Cal. Rptr. 153] . Thus, all of the parties to a dispute who intend to settle the obligations involved should take part in the compromise and settlement.

[c] Meeting of the Minds

To constitute an effective compromise agreement, there must be evidence that the parties mutually intend to resolve their differences [*Enslow v. Von Guenther* (1961) 193 Cal. App. 2d 318, 321, 14 Cal. Rptr. 231] . Compromises cover only those matters contemplated by the parties and do not include controversies that, although in existence at the time of the agreement, were never intended to be included or compromised by the parties [*Shriver v. Kuchel* (1952) 113 Cal. App. 2d 421, 426, 248 P.2d 35] .

[d] Consideration for Compromise Agreement

The bargained-for compromise of a claim furnishes sufficient consideration for a compromise agreement. However, the compromise must concern an "honest" dispute in order to constitute consideration [*Enslow v. Von Guenther* (1961) 193 Cal. App. 2d 318, 321-322, 14 Cal. Rptr. 231 ; see § 77.17[6][d]].

Unless a claim is advanced in bad faith or is without foundation, its actual validity is immaterial in determining whether forbearance from proceeding on it is sufficient consideration [*Goldstone-Tobias Agency, Inc. v. Barbroo Enterprises Productions, Inc.* (1965) 237 Cal. App. 2d 720, 722, 47 Cal. Rptr. 347] . The general rule that a compromise of a claim advanced in good faith is good consideration applies in both tort claims and commercial disputes, even though later developments prove the claim to be ill-founded [*Estate of Freeman* (1965) 238 Cal. App. 2d 486, 490, 48 Cal. Rptr. 1 (stating general rule but holding it inapplicable to probate compromises)].

[e] Consideration in Probate Compromises

The general principles governing consideration for compromise agreements are modified in a settlement of a probate dispute. Before making a distribution under a compromise of a claim to an estate, the court may inquire into the sufficiency and reasonableness of the consideration [Prob. Code § 1020.1; *Estate of Freeman* (1965) 238 Cal. App. 2d 486, 490, 48 Cal. Rptr. 1] .

[7] Offer for Compromise Settlement of Matter in Litigation

If the subject of a proposed compromise agreement is in litigation, either party may serve a written offer on the other to allow judgment to be taken pursuant to the terms of the offer. The written offer must include a statement of the offer, containing the terms of the judgment or award, and a provision that allows the accepting party to indicate acceptance by signing a statement that the offer is accepted. Any acceptance, whether made on the document containing the offer or on a separate document of acceptance, must be in writing and signed by the accepting party's counsel or, if not represented by counsel, by the accepting party [Code Civ. Proc. § 998(b)]. The written offer must be served not less than 10 days before trial [Code Civ. Proc. § 998(b)]. If the offer is accepted, the resulting agreement will be filed, and judgment (which is deemed a "compromise settlement" will be entered accordingly [Code Civ. Proc. § 998(b)(1)]. If the offer is not accepted before trial or within 30 days after it is made, it will be deemed withdrawn and cannot be used as evidence in the trial [Code Civ. Proc. § 998(b)(2)].

A plaintiff who declines a defendant's offer and then does not get a more favorable judgment may not recover post-offer costs and must pay the defendant's costs from the time of the offer. Except in an eminent domain action, the court or arbitrator in its discretion may also require the plaintiff to pay a reasonable sum to cover costs of the services of expert witnesses who are not regular employees of any party, actually incurred and reasonably necessary in either the

preparation for trial or the arbitration, or both, or during trial or arbitration, of the case by the defendant [*Code Civ. Proc. § 998(c)(1)*]. The post-offer costs awarded will be deducted from any damages awarded to the plaintiff. If these costs exceed the damages, judgment will be entered awarding the net amount to the defendant [*Code Civ. Proc. § 998(e)*].

A defendant who declines a plaintiff's offer and does not get a more-favorable judgment may be required to pay the plaintiff's costs as well as a reasonable sum to cover post-offer costs for the services of expert witnesses who are not regular employees of any party, actually incurred and reasonably necessary in either the preparation for trial or the arbitration, or both, or during trial or arbitration, of the case by the plaintiff [*Code Civ. Proc. § 998(d)*].

These rules do not apply to eminent domain actions [*Code Civ. Proc. § 998(c)(1), (d), (g)*], inverse condemnation actions [*Orpheum Bldg. Co. v. San Francisco Bay Area Rapid Transit Dist. (1978) 80 Cal. App. 3d 863, 878, 146 Cal. Rptr. 5*], or labor arbitrations filed under memoranda of understanding under *Gov. Code § 3512 et seq.* [*Code Civ. Proc. § 998(i)*].

For discussion of offers for compromise settlements, a form illustrating such an offer, and ancillary forms, see California Forms of Pleading and Practice, Ch. 520, *Settlement and Release* (Matthew Bender).

Legal Topics:

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

Civil Procedure Settlements Settlement Agreements General Overview Contracts Law Types of Contracts Settlement Agreements



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DIVISION V: CONTRACTS AND OBLIGATIONS
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§ 77.18 Releases

[1] In General

An obligation is extinguished by a release given by the obligee to the obligor [*Civ. Code § 1541*]. A release operates as an abandonment or relinquishment of the underlying claim [*see Pellett v. Sonotone Corp. (1945) 26 Cal. 2d 705, 711, 160 P.2d 783*] and contrasts with a compromise agreement, which, in general, bars reopening of the original controversy [*County of Los Angeles v. Law Bldg. Corp. (1967) 254 Cal. App. 2d 848, 853, 62 Cal. Rptr. 542*]. The two types of instruments are usually combined in order to obtain an agreement that completely and unequivocally discharges the obligation involved [*see § 77.17[5]*].

[2] Effect of General Release on Unknown Claims

A general release does not cover claims that the obligee does not either know or suspect to exist in his or her favor at the time he or she executes the release, when those claims, if known by the obligee, would have materially affected the settlement with the obligor [*Civ. Code § 1542*]. On its face this rule appears to prohibit the release of unknown claims. However, its purpose is to prevent a mere recital in the release from barring later-discovered claims in the absence of a showing that the obligee consciously understands that a later-discovered claim will be discharged by the release [*Casey v. Proctor (1963) 59 Cal. 2d 97, 109, 28 Cal. Rptr. 307, 378 P.2d 579*]. Thus, an obligee who is conscious, and knows the significance, of his or her act may intelligently release all unknown claims [*Casey v. Proctor (1963) 59 Cal. 2d 97, 109, 28 Cal. Rptr. 307, 378 P.2d 579* ; *Carmichael v. Industrial Acc. Comm. (1965) 234 Cal. App. 2d 311, 314-315, 44 Cal. Rptr. 470*] .

In other words, one cannot release unknown claims merely by making a general reference to unknown claims. In order to apply a release to unknown claims, it must be shown, apart from the words of the release, that there was an intent to include those claims [*Casey v. Proctor (1963) 59 Cal. 2d 97, 109, 28 Cal. Rptr. 307, 378 P.2d 579*] . Whether one consciously intended to release unknown claims is a question of fact [*Commercial Ins. Co. v. Copeland (1967) 248 Cal. App. 2d 561, 56 Cal. Rptr. 794* ; *Carmichael v. Industrial Acc. Comm. (1965) 234 Cal. App. 2d 311, 44 Cal. Rptr. 470*] and depends on whether the release was knowingly made [*Casey v. Proctor (1963) 59 Cal. 2d 97, 113, 28 Cal. Rptr. 307, 378 P.2d 579*] .

The danger inherent in obtaining a release of unknown claims without an adequate independent showing of an intent to include those claims is that the release can be rescinded [see *Casey v. Proctor* (1963) 59 Cal. 2d 97, 113-115, 28 Cal. Rptr. 307, 378 P.2d 579 (discussion of facts supporting rescission)]. For discussion of rescission, see § 77.22.

[3] Effect of General Release on Insurance Bad Faith Claims

Claims that an insurer has committed unfair claims settlement practices (that is, insurance bad faith claims) [see *Ins. Code* § 790.03(h)] are not necessarily released by a general release that names both a defendant and his or her insurer. If a release specifically excepts and reserves a plaintiff's right to assert a bad faith action, that right obviously is not released [see *Vega v. Western Employers Ins. Co.* (1985) 170 Cal. App. 3d 922, 926, 216 Cal. Rptr. 592]. However, when the release does not expressly cover such claims and contains a waiver of unknown claims under *Civ. Code* § 1542, parol evidence is admissible to determine whether the obligee intended to waive the insurance bad faith claim [*Vega v. Western Employers Ins. Co.* (1985) 170 Cal. App. 3d 922, 927, 216 Cal. Rptr. 592].

[4] Legal Requirements for Valid Release

[a] Consideration

A written release requires no consideration [*Civ. Code* § 1541; *Worthington v. State Bd. of Control* (1968) 266 Cal. App. 2d 697, 700, 72 Cal. Rptr. 449]; however, when a written release is not supported by consideration, it must expressly show the obligee's intent to extinguish the obligation [*Tenzer v. Superscope, Inc.* (1985) 39 Cal. 3d 18, 31, 216 Cal. Rptr. 130, 702 P.2d 212]. Consideration is mandatory for an oral release [*Civ. Code* § 1541]. Although a release may not be set aside solely on the ground that the consideration for it was inadequate, if the consideration given is questionable, then additional grounds, such as fraud, misrepresentation, or duress, are used to limit the application of a release. If it is shown that deception was practiced in obtaining a release, the release may not be considered as a satisfaction of anything not actually consented to [*Moore v. Rogers* (1958) 157 Cal. App. 2d 192, 196, 320 P.2d 524].

[b] Mutual Assent

A release is a settlement of those matters on which the minds of the parties have met; it may not be considered to be in satisfaction of anything to which they did not consent. As with other contracts, assent to a release is not real and free when obtained through fraud, and a release based on fraud may be avoided [*King v. Associated Construction Corp.* (1960) 183 Cal. App. 2d 818, 822, 7 Cal. Rptr. 182]. If a release is required as an unlawful condition for payment, the release is ineffective [*Worthington v. State Bd. of Control* (1968) 266 Cal. App. 2d 697, 700, 72 Cal. Rptr. 449]. For discussion of mutual assent in the context of unknown claims, see § 77.18[2].

[c] Type Size

A release may be held unenforceable if it is printed in a type size that cannot easily be read by a person of ordinary vision, or is so small that one could conclude that the party offering it for execution did not intend it to be read, or is calculated to conceal and not to warn the unwary. A release printed in 10-point type would comport with a number of minimum type sizes prescribed by statute for special types of contracts or contract language [*Hulsey v. Elsinore Parachute Center* (1985) 168 Cal. App. 3d 333, 339, 214 Cal. Rptr. 194].

[d] Clear and Explicit Language

A release prepared by the obligor, when read as a whole, must clearly notify the prospective obligee of the effect of signing the release [*Hulsey v. Elsinore Parachute Center* (1985) 168 Cal. App. 3d 333, 341, 214 Cal. Rptr. 194]. A statement that the obligee will "save harmless and keep indemnified" the obligor does not reasonably alert a lay person to the significance of the release and is not sufficiently clear and explicit to validate it [*Ferrell v. Southern Nevada Off-Road Enthusiasts, Ltd.* (1983) 147 Cal. App. 3d 309, 314-319, 195 Cal. Rptr. 90]. In other words, a release should

not disguise its operative language in legalese but should be prepared in simple, clear, and unambiguous language that is understandable to any lay person [see *Hulsey v. Elsinore Parachute Center* (1985) 168 Cal. App. 3d 333, 341, 214 Cal. Rptr. 194] .

[e] Legal Object

If the intent of a release is to exempt a person from responsibility for his or her own fraud, willful injury to another's person or property, or violation of law (whether willful or negligent), it is against public policy [Civ. Code § 1668]. For example, a contract clause that prohibited any recovery of damages, but not equitable relief, for any violation of statutory or regulatory law not made part of the parties' contractual obligations was held invalid under this statute [see *Health Net of California, Inc. v. Department of Health Services* (2003) 113 Cal. App. 4th 224, 226-227, 6 Cal. Rptr. 3d 235] . However, exculpatory releases from liability for future simple negligence or strict liability are not necessarily against public policy under this statutory provision [*Hulsey v. Elsinore Parachute Center* (1985) 168 Cal. App. 3d 333, 339, 214 Cal. Rptr. 194 (sports activities); see § 77.18[6]].

[5] Releases When There Are Multiple Obligors

[a] Effect of Release

A release of one of two or more joint obligors does not extinguish the obligations of any of the other joint obligors (unless they are merely guarantors) or affect their right of contribution from the released obligor, except as stated below [Civ. Code § 1543]. Joint judgment debtors may compel contribution among themselves in certain circumstances [see *Code Civ. Proc. § 881 et seq.*].

When a release (or a dismissal or a covenant not to sue) is given, in good faith before a verdict or judgment, to one or more of a number of tortfeasors allegedly liable for the same tort, or to one or more other co-obligors mutually subject to contribution rights, it does not discharge any of the other tortfeasors or other co-obligors not specifically released. However, it will operate to reduce the claims against the others in the amount stipulated in the release or the consideration paid for it, whichever is greater [Code Civ. Proc. § 877(a)], while discharging the released party from liability for contribution to the other tortfeasors or other co-obligors [Code Civ. Proc. § 877(b)]. Thus, for example, the release of a corporate subsidiary does not release the parent corporation [*Mesler v. Bragg Management Co.* (1985) 39 Cal. 3d 290, 303-304, 216 Cal. Rptr. 443, 702 P.2d 601] .

These statutory rules change the common law rules under which a person who signed a release relinquished all existing claims against all tortfeasors (because the release extinguished the cause of action) while a person who signed a covenant not to sue one of the joint tortfeasors did not relinquish claims against the others (because the covenant did not extinguish the cause of action against the others) [*Pellett v. Sonotone Corp.* (1945) 26 Cal. 2d 705, 711, 160 P.2d 783] .

[b] Exceptions to Rules Governing Effect of Release

Code Civ. Proc. § 877 does not apply to co-obligors who have expressly agreed in writing to an apportionment of liability for losses or claims among themselves [Code Civ. Proc. § 877(c)]. The statute also does not apply if the release, dismissal, or covenant not to sue or not to enforce judgment is given to a co-obligor on a claimed contract debt for a contract made before 1988 [Code Civ. Proc. § 877(d)].

[c] Good Faith Requirement

When a settlement has been reached with one of a number of joint tortfeasors or co-obligors on a contract debt, the other joint tortfeasors or co-obligors are entitled to a hearing on whether the settlement was entered into in good faith [Code Civ. Proc. § 877.6(a)]. If the court finds that the settlement was made in good faith, the other joint tortfeasors

will be barred from claims against the settling party for contribution or indemnity based on comparative negligence or fault [*Code Civ. Proc.* § 877.6(c)].

Factors to consider in determining good faith include whether the amount of the settlement is within the reasonable range of the settling tortfeasor's proportional share of comparative liability for the plaintiff's injuries, the financial conditions and policy limits of the settling defendants, and the existence of collusion, fraud, or tortious conduct aimed at injuring the interests of the nonsettling parties. The evaluation must be made on the basis of information available at the time of settlement. Bad faith is not established by showing that the settling party paid less than a theoretical proportional share [*Tech-Bilt, Inc. v. Woodward-Clyde & Associates* (1985) 38 Cal. 3d 488, 499, 213 Cal. Rptr. 256, 698 P.2d 159] .

[6] Exculpatory Releases

[a] In General

A contract is against public policy if its object is to exempt a person from responsibility for his or her own fraud, willful injury to another's person or property, or violation of law (whether willful or negligent) [*Civ. Code* § 1668]. However, this rule does not invalidate contracts that seek to release one from liability for future simple negligence or strict liability (an "exculpatory release") [*Hulsey v. Elsinore Parachute Center* (1985) 168 Cal. App. 3d 333, 339, 214 Cal. Rptr. 194 (sports activities)] as long as it affects only the private affairs of the parties [*Barkett v. Brucato* (1953) 122 Cal. App. 2d 264, 276, 264 P.2d 978 (landlord-tenant)]. For example, a release of all premises liability in consideration of permission to enter recreational and social facilities for any purpose does not violate public policy [*Benedek v. PLC Santa Monica, LLC* (2002) 104 Cal. App. 4th 1351, 1358-1359, 129 Cal. Rptr. 2d 197 (health club member who signed waiver of liability for all personal injuries sustained on premises "whether using exercise equipment or not" was injured by falling television)]. However, an agreement made in the context of sports or recreational programs or services, purporting to release anyone from liability for future gross negligence, generally is unenforceable as a matter of public policy [*City of Santa Barbara v. Superior Court (Janeway)* (2007) 41 Cal. 4th 747, 62 Cal. Rptr. 3d 527, 161 P.3d 1095, 2007 Cal. LEXIS 7603, at *3] .

Even if an agreement is found to be a contract of adhesion, it will be enforced unless doing so would defeat the weaker party's reasonable expectations or be unconscionable [*Hulsey v. Elsinore Parachute Center* (1985) 168 Cal. App. 3d 333, 344, 214 Cal. Rptr. 194 (upholding exculpatory release); see *Graham v. Scissor-Tail, Inc.* (1981) 28 Cal. 3d 807, 819-820, 171 Cal. Rptr. 604, 623 P.2d 165 ; *Queen Villas Homeowners Ass'n v. TCB Property Mgmt.* (2007) 149 Cal. App. 4th 1, 6, 56 Cal. Rptr. 3d 528 ("If parties go out of their way and say 'we really, really mean it,' language clearly contemplating exculpation may be enforced."); see also *Powers v. Dickson, Carlson & Campillo* (1997) 54 Cal. App. 4th 1102, 1110, 63 Cal. Rptr. 2d 261 ; *Allan v. Snow Summit, Inc.* (1996) 51 Cal. App. 4th 1358, 1375-1376, 59 Cal. Rptr. 2d 813 (upholding exculpatory release)].

[b] Release Affecting Public Interest

On the other hand, an exculpatory release that "affects the public interest" is invalid [*Tunkl v. Regents of University of California* (1963) 60 Cal. 2d 92, 96, 32 Cal. Rptr. 33, 383 P.2d 441 (hospital); *Belshaw v. Feinstein* (1968) 258 Cal. App. 2d 711, 727, 65 Cal. Rptr. 788 (surgeon); see *Neubauer v. Goldfarb* (2003) 108 Cal. App. 4th 47, 54-57, 133 Cal. Rptr. 2d 218 (waiver of corporate directors' and majority shareholders' fiduciary duties to minority shareholder in private close corporation is against public policy and contract provision in buy-sell agreement purporting to effect such a waiver is void)]. An exculpatory release may affect the public interest and therefore be invalid if the transaction exhibits any of the following characteristics [*Tunkl v. Regents of University of California* (1963) 60 Cal. 2d 92, 98-101, 32 Cal. Rptr. 33, 383 P.2d 441 ; see *Gavin W. v. YMCA of Metropolitan Los Angeles* (2003) 106 Cal. App. 4th 662, 671-674, 131 Cal. Rptr. 2d 168 (holding that agreement exculpating child care provider from its own negligence was void as against public policy and finding that contract involved public interest under *Tunkl* criteria); *YMCA of*

Metropolitan Los Angeles v. Superior Court (1997) 55 Cal. App. 4th 22, 27, 63 Cal. Rptr. 2d 612 (recreational activities provided for seniors at community center did not involve public interest); *but see City of Santa Barbara v. Superior Court (Janeway)* (2007) 41 Cal. 4th 747, 62 Cal. Rptr. 3d 527, 161 P.3d 1095, 2007 Cal. LEXIS 7603, at *3 (agreement made in context of sports or recreational programs or services, purporting to release anyone from liability for future gross negligence, generally is unenforceable as matter of public policy)]:

- It concerns a business suitable for public regulation.
- The party seeking exculpation performs a service of great importance to the public that is often a matter of practical necessity for some members of the public.
- That party holds itself out as willing to perform that service for any person who seeks it or, at least, to any person coming within established standards.
- As a result of the essential nature of the service, in the economic setting of the transaction, that party possesses decisive bargaining strength against members of the public seeking its services.
- In exercising a superior bargaining power, that party confronts the public with a standardized adhesion contract of exculpation (and makes no provision for additional protection against negligence through an additional reasonable fee).
- As a result of the transaction, the person or property of the other party is placed under the control of the party seeking exculpation, subject to the risk of carelessness by that party or its agent.

Legal Topics:

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

Civil Procedure Settlements Releases From Liability General Overview Contracts Law Types of Contracts Releases



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§ 77.19 Account Stated

[1] Definition

An account stated is an agreement, based on prior transactions between the parties, that all items of the account are true and that the balance struck is due and owing from one party to the other [*Trafton v. Youngblood* (1968) 69 Cal. 2d 17, 25, 69 Cal. Rptr. 568, 442 P.2d 648] . It amounts to an agreement between the parties that a certain sum will be paid and accepted in discharge of an obligation [*Withers v. Matthews* (1961) 192 Cal. App. 2d 139, 141, 13 Cal. Rptr. 165] . For discussion of creating an account stated, see [4], below.

[2] Legal Effect

An account stated that has been assented to by the debtor, either implicitly or expressly, constitutes a new contract between the parties to pay the agreed-on amount [*Shapiro v. Equitable Life Assur. Soc.* (1946) 76 Cal. App. 2d 75, 90, 172 P.2d 725] . It has the effect of altering the nature of the original indebtedness so that the account stated becomes, in effect, a new promise or undertaking [*Hallford v. Baird* (1938) 27 Cal. App. 2d 384, 389, 80 P.2d 1040] . An action on an account stated is therefore not on the original transaction of the parties but is on the new contract [*Fogarty v. McGuire* (1959) 170 Cal. App. 2d 405, 409, 338 P.2d 992] .

[3] Statute of Limitations

An action may be brought to recover under an account stated within four years after the account is stated in writing. Acknowledgment of the account stated need not be in writing in order for the four-year limitation period to apply [Code Civ. Proc. § 337(2)]. Thus, one result of using an account stated is to extend the period during which a creditor may sue for recovery of the amount owed, since the action is not on the original transaction but on the new contract embodied in the account stated [*Fogarty v. McGuire* (1959) 170 Cal. App. 2d 405, 409, 338 P.2d 992] .

[4] Creation

The essential elements of an account stated are [*Zinn v. Fred R. Bright Co.* (1969) 271 Cal. App. 2d 597, 600, 76 Cal. Rptr. 663] :

- Previous transactions between the parties establishing the relationship of debtor and creditor.
- An agreement between the parties, express or implied, on the amount due from the debtor to the creditor.
- A promise by the debtor, express or implied, to pay the amount due.

An account stated may be created between a debtor and a creditor by either party sending the other a statement that reflects the current state of their account and the amount of the indebtedness claimed to be due; if the recipient of the statement then either expressly or implicitly assents to the statement, an account stated results [*Shapiro v. Equitable Life Assurance Soc.* (1946) 76 Cal. App. 2d 75, 90]. The debtor's silence or failure to protest the amount stated to be due is equivalent to assent, implying a promise to pay and giving rise to an account stated [*Levy v. Prinzmetal* (1955) 134 Cal. App. 2d Supp. 919, 922]. The debtor's objection must be made within a reasonable period of time in order to avoid implicit acquiescence to the account stated [*Trafton v. Youngblood* (1968) 69 Cal. 2d 17, 25, 69 Cal. Rptr. 568, 442 P.2d 648]. However, failure to protest cannot create liability when no liability existed before the account stated was rendered [*Trafton v. Youngblood* (1968) 69 Cal. 2d 17, 26, 69 Cal. Rptr. 568 ; see [6], below].

An account stated need not be based on a written statement or arise out of written accounts but may be based on an oral agreement [*Fleschler v. Strauss* (1936) 15 Cal. App. 2d 735, 740, 60 P.2d 193]. If a written statement is used, it should be more than a mere memorandum. It should indicate clearly and with certainty that it is intended to be a final settlement up to date [*Fogarty v. McGuire* (1959) 170 Cal. App. 2d 405, 409, 338 P.2d 992].

No particular form is required to create an account stated. For example, a check, whether or not cashed, may be the basis for an account stated [*Zinn v. Fred R. Bright Co.* (1969) 271 Cal. App. 2d 597, 601-602, 76 Cal. Rptr. 663]. The creditor's accepting and cashing of a check bearing a notation that it is in full payment of a specified account, while not conclusive, is persuasive evidence of an account stated [*Kinkle v. Fruit Growers Supply Co.* (1944) 63 Cal. App. 2d 102, 113-114]. The acceptance of payment may constitute an account stated against the creditor if it was given by the debtor to the creditor in discharge of the balance due on the account [*Levy v. Prinzmetal* (1955) 286 P.2d 1023].

[5] Nature of Underlying Transaction

An account stated must be founded on a previous monetary transaction. When there is no underlying indebtedness, one is not created simply by sending an invoice [*Curtis v. Mendenhall* (1962) 208 Cal. App. 2d 834, 840, 25 Cal. Rptr. 627]. A creditor could not, for example, create an account stated by sending a bill to the relative of a debtor when the relative is not legally obligated to pay the debt [*Swim v. Juhl* (1925) 72 Cal. App. 363, 366, 237 P. 552], nor can an attorney fix a fee unilaterally and create an account stated based on that action [*Trafton v. Youngblood* (1968) 69 Cal. 2d 17, 26, 69 Cal. Rptr. 568, 442 P.2d 648].

The underlying claim must be liquidated before an account stated can be created; an account stated cannot include an unliquidated claim. Therefore, unless the underlying claim, whether in contract or tort, is reduced to a definite amount by agreement between the parties, it cannot legitimately form a portion of an account stated [*California Milling Corp. v. White* (1964) 229 Cal. App. 2d 469, 478, 40 Cal. Rptr. 301].

An account stated cannot be created when the underlying debt is embodied in an express contract such as a promissory note, or when the debt is predicated on the breach of the terms of an express contract [*Moore v. Bartholomae Corp.* (1945) 69 Cal. App. 2d 474, 477-478, 159 P.2d 436]. No subsequent statement of the amount due can supersede the contractual promise so as to form the basis of an action to recover the original debt. Inasmuch as the debtor is already bound by the original promise, there is no need for a subsequent statement and promise to pay [*Rio Linda Poultry Farms v. Fredericksen* (1932) 121 Cal. App. 433, 435-436, 9 P.2d 262].

[6] Defenses Against Account Stated

An account stated does not operate as an estoppel; it may be challenged in whole or in part on the ground of fraud or mistake [*Western Talc Co. v. Blaufuss* (1938) 25 Cal. App. 2d 270, 278, 77 P.2d 479] , except when the parties have expressly agreed to be bound by the statement of transactions--for example, in dealings between stock brokers and their customers involving securities of fluctuating value [*Wong v. Paine, Webber, Jackson & Curtis* (1962) 208 Cal. App. 2d 17, 19, 24 Cal. Rptr. 821] . An account stated is not conclusive but merely furnishes prima facie evidence of its accuracy, which may be impeached by a showing of fraud, omission, or mistake [*Kinkle v. Fruit Growers Supply Co.* (1944) 63 Cal. App. 2d 102, 113-114]. However, the legal effect of an account stated cannot be nullified, and the new obligation cannot be destroyed, by the subsequent refusal of the debtor to pay the agreed amount or of the creditor to receive the agreed amount in full satisfaction of the account [*Levy v. Prinzmetal* (1955) 134 Cal. App. 2d Supp. 919, 922].

Legal Topics:

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

Contracts LawDebtor & Creditor RelationsContracts LawTypes of ContractsGeneral Overview



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§ 77.20 Novation

[1] Definition and Nature

Novation is the substitution of a new obligation for an existing one [*Civ. Code § 1530*]. There are four essential elements [*U.S. Gypsum Co. v. Snyder-Ashe Co. (1934) 139 Cal. App. 731, 733, 34 P.2d 767*] :

- A previous valid obligation.
- The agreement of all parties to the new contract.
- The extinguishment of the old contract.
- A valid new contract.

The most common kind of novation involves the substitution of a new obligation for an old one between the same parties with intent to extinguish the old obligation [*Civ. Code § 1531(1)*]. However, novation can also be used to change the parties, either to substitute a new obligor in place of the original one (when there is intent to release the latter) [*Civ. Code § 1531(2)*] or to substitute a new obligee in place of the former one (when there is intent to transfer the rights of the original to the new obligee) [*Civ. Code § 1531(3)*].

[2] Legal Effect

In general, when it can be shown that a new agreement was intended by the parties to take the place of an existing one, the preexisting one is entirely abrogated or extinguished. The result is a novation, and the rights and duties of the parties are governed by the new agreement alone. Failure to perform under the new agreement does not revive the old agreement [*Alexander v. Angel (1951) 37 Cal. 2d 856, 862, 236 P.2d 561*] .

[3] Statutory Right to Rescind

The general rule that a novation abrogates or extinguishes the preexisting obligation is subject to a statutory right on the

part of the obligee to rescind a novation under which the obligee has accepted the obligation of a new obligor in satisfaction of the original obligation. In such a situation, the obligee may rescind acceptance if the original obligor prevents the new obligor from complying or if the new obligor is insolvent at the time the obligee receives the new obligation, and the obligee is unaware of that fact. The obligee may also rescind acceptance if the new obligor becomes insolvent before the obligee, acting with reasonable diligence, can present a claim against the new obligor [*Civ. Code* § 1533].

[4] Application of Contract Principles

The act of novation is made by contract and is thus subject to the rules governing contracts in general [*Civ. Code* § 1532]. These include requirements for a lawful object, competent parties, their consent (that is, a meeting of the minds), and consideration [*Civ. Code* § 1550]. For discussion of the consent requirements, see [5] and [6], *below*. For coverage of consideration as it relates to novations, see [7], *below*.

[5] Consent Required for Novation

Generally, in order to have a novation, all of the parties concerned must agree [*Civ. Code* § 1532; *Garthofner v. Edmonds* (1946) 74 Cal. App. 2d 15, 20, 167 P.2d 789]. The consent of the parties to a novation, as with any other contract, must be free, mutual, and communicated by each to the other [*Civ. Code* § 1565]. Thus, the parties must clearly indicate their intent to extinguish the old agreement [see, e.g., *Paykar Construction, Inc. v. Spilat Construction Corp.* (2001) 92 Cal. App. 4th 488, 494, 111 Cal. Rptr. 2d 863 (no evidence that subcontractor who settled with property owners and accepted promissory note in lieu of original debt also intended to substitute note for general contractor's obligation to subcontractor)]. Whether each party intended to extinguish the old agreement is a question of fact [*Eluschuk v. Chemical Engineers Termite Control, Inc.* (1966) 246 Cal. App. 2d 463, 468, 54 Cal. Rptr. 711].

The alteration of a part of a contract will not be considered a novation, even if it is a valid alteration, because the old contract is still the basis of the relationship between the parties [*Goodman v. Citizens Life & Cas. Ins. Co.* (1967) 253 Cal. App. 2d 807, 816-817, 61 Cal. Rptr. 682].

[6] Intent Required for Substitution of New Parties

A new obligor can be substituted for an original one [*Civ. Code* § 1531(2)], or a new obligee can be substituted in place of the original one [*Civ. Code* § 1531(3)].

When the original obligee desires to substitute a third party in his or her place, the original obligee must intend not only to change his or her status as an obligee but also to transfer his or her rights to the new obligee [*Civ. Code* § 1531], and the new obligee must also consent to receive the benefit [*Molera v. Cooper* (1916) 173 Cal. 259, 262-263, 160 P. 231]. In this type of novation, there must be a substitution: an assumption of the right to receive contract payments does not amount to a novation unless the new obligee also assumes the obligations of the contract [see *Fewel & Dawes, Inc. v. Pratt* (1941) 17 Cal. 2d 85, 91, 109 P.2d 650]. In addition, since the assent of all parties is generally necessary (depending on the type of novation and the considerations involved) [*Alexander v. Angel* (1951) 37 Cal. 2d 856, 863, 236 P.2d 561], the consent of the obligor should be obtained in order to protect the obligor with respect to any defenses he or she may have against the original obligee. For a novation agreement substituting a new obligee, see § 77.282[2].

[7] Consideration Required for Novation

Novation is made by contract and is subject to the rules concerning contracts generally [*Civ. Code* § 1532], including the requirement of legally sufficient consideration. A purported novation lacked consideration when the promise was to pay a debt that the promisor was already legally obligated to pay [*Garthofner v. Edmonds* (1946) 74 Cal. App. 2d 15, 19, 167 P.2d 789]. A unilateral promise to pay a lesser amount than that originally promised lacks sufficient

consideration to support a novation [*Blumer v. Madden* (1932) 128 Cal. App. 2d 22, 25, 16 P.2d 319] . However, the mutual surrender of rights under the original agreement is sufficient consideration for the novation agreement [*Jura v. Sunshine Biscuits, Inc.* (1953) 118 Cal. App. 2d 442, 446-447, 258 P.2d 90] . When a new obligor is substituted for an old one, the obligee's release of the old obligor will be sufficient consideration to bind the new one [*Manfre v. Sharp* (1930) 210 Cal. 479, 481, 292 P. 465] .

Legal Topics:

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

Contracts LawPerformanceGeneral OverviewContracts LawPerformanceNovation



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27-77 California Legal Forms--Transaction Guide § 77.21

§ 77.21 Modification

[1] Definition

A modification is an agreement by the parties to an existing contract, altering their obligations without deleting any of the elements essential to the validity of the original contract [*Carlson, Collins, Gordon & Bold v. Banducci* (1967) 257 Cal. App. 2d 212, 223, 64 Cal. Rptr. 915] . A later alteration of the details of a contract that leaves its general purpose undisturbed is a modification rather than a rescission [*Travelers Ins. Co. v. Workmen's Comp. App. Bd.* (1967) 68 Cal. 2d 7, 17, 64 Cal. Rptr. 440, 434 P.2d 992 (oral agreement)].

[2] Written Modification of Oral Contract

An oral contract may be modified in any respect with the written consent of the parties. This type of modification does not require new consideration. Once modified, the original contract is extinguished to the extent of the modification [Civ. Code § 1697].

[3] Method of Modifying Written Contracts

A written contract (except for the sale of goods; *see below*) may be altered by a contract in writing [Civ. Code § 1698(a)] or by an oral agreement to the extent that the oral agreement is performed ("executed") by the parties [Civ. Code § 1698(b)]. Unless the contract expressly provides otherwise, a contract in writing may be modified by an oral agreement supported by new consideration. However, in that case the statute of frauds [*see Civ. Code § 1624*] must be satisfied if the contract as modified is within its provisions [Civ. Code § 1698(c)]. (Before 1977, the rule was that a written contract could be modified only by a contract in writing or by an executed oral agreement [former Civ. Code § 1698; *see* Stats. 1976, ch. 109, § 5 (former Civ. Code § 1698 and applicable case law continue to apply to contracts made before 1977)].) These rules do not preclude application, in appropriate cases, of estoppel, oral novation and substitution of a new agreement, oral rescission, waiver, or oral independent collateral contracts [Civ. Code § 1698(d)].

A written contract for the sale of goods may be modified only by a written agreement or by an oral agreement fully executed by both parties [Com. Code § 2209(2)], although an attempt at modification that does not meet the foregoing requirements may still operate as a waiver [*see Com. Code § 2209(3), (4)*]. For further discussion, *see* Ch. 52, *Sales of*

Goods Under the Uniform Commercial Code .

For forms to use in modifying a written contract, see §§ 77.320-77.322.

[4] Consideration Required for Modification

In general, a modification of a written contract is not binding unless supported by consideration [*Fairlane Estates v. Carrico Constr. Co. (1964) 228 Cal. App. 2d 65, 71, 39 Cal. Rptr. 35 ; but see [2], above*]. However, distinction is drawn between a modifying supplemental agreement and an explanatory supplemental agreement. The latter does not require additional consideration [*Cutter Laboratories, Inc. v. Twining (1963) 221 Cal. App. 2d 302, 311, 34 Cal. Rptr. 317 (dicta)*; see *Main S. & A.P.R. Co. v. Los Angeles Traction Co. (1900) 129 Cal. 301, 305, 61 P. 937*]. Furthermore, a term or provision erroneously omitted may be added without further consideration [*Texas Company v. Todd (1937) 19 Cal. App. 2d 174, 186, 64 P.2d 1180*] .

The consideration requirement is met if parties to a written modification mutually substitute new reciprocal rights and duties for those relinquished [*House v. Lala (1963) 214 Cal. App. 2d 238, 243-244, 29 Cal. Rptr. 450*] . The relinquishment of a right or duty by one party, without a reciprocal relinquishment by the other, does not constitute sufficient consideration. If one party merely does what he or she was obligated to do under the original contract, while the other party relinquishes a right or duty, the modification will fail for lack of consideration [*Fairlane Estates v. Carrico Constr. Co. (1964) 228 Cal. App. 2d 65, 71, 39 Cal. Rptr. 35*] .

Furthermore, the mutuality of obligation principle requiring new consideration for contract termination applies only to bilateral contracts. In this regard, the California Supreme Court has held that an employer may unilaterally terminate a policy that contains a specified condition if the condition is one of indefinite duration and the employer effects the change after a reasonable time, on reasonable notice, and without interfering with the employees' vested benefits. The general rule governing the proper termination of unilateral contracts is that once the promisor determines after a reasonable time that it will terminate or modify the contract, and provides employees with reasonable notice of the change, additional consideration is not required. The court stated that for an effective modification, there is consideration in the form of continued employee services [*Asmus v. Pacific Bell (2000) 23 Cal. 4th 1, 14-15, 96 Cal. Rptr. 2d 179, 999 P.2d 71*] .

In contrast to the rules discussed above, an agreement modifying a contract for the sale of goods needs no consideration [*Com. Code § 2209(1)*]. However, such a modification must still meet the test of "good faith" between merchants [see *Com. Code § 1203*], that is, "honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade." This test bars extortion of a modification without legitimate commercial reason. Similarly, technical consideration for a bad faith modification will not suffice [*Com. Code § 2209, Official UCC Comment 2*]. For further discussion, see Ch. 52, *Sales of Goods Under the Uniform Commercial Code* .

[5] Mutuality Required for Modification

The mutual assent of all parties is a prerequisite to every modification agreement [*Carlson, Collins, Gordon & Bold v. Banducci (1967) 257 Cal. App. 2d 212, 223, 64 Cal. Rptr. 915*] . Therefore, in a tripartite agreement, two parties cannot modify a contract to a third party's prejudice [*Hotle v. Miller (1959) 51 Cal. 2d 541, 543, 334 P.2d 849*] .

Legal Topics:

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

Contracts LawContract ModificationsGeneral OverviewContracts LawContract ModificationsOral ModificationsContracts LawContract ModificationsPreexisting Duties



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§ 77.22 Rescission

[1] In General

A contract may be extinguished by rescission [*Civ. Code §§ 1682, 1688*]. Rescission may be by mutual agreement [*Civ. Code § 1689(a)*] or, in certain circumstances, by unilateral notice [*Civ. Code § 1689(b)*; see [2], below].

Rescission of a written contract for the sale of goods must be accomplished by either a written agreement or an oral agreement fully executed by the parties [*Com. Code § 2209(2)*]; however, an attempt at rescission that does not meet the foregoing requirements can still operate as a waiver [see *Com. Code § 2209(4), (5)*]. For further discussion, see Ch. 52, *Sales of Goods Under the Uniform Commercial Code*.

[2] Unilateral Rescission

[a] Generally

One of the parties to a contract may rescind the contract in any of the following cases:

- If the consent of that party or of anyone jointly contracting with that party was given by mistake or obtained through duress, menace, fraud, or undue influence, exercised by or with the connivance of the party against whom the rescission is exercised or any other party to the contract jointly interested with that party [*Civ. Code § 1689(b)(1)*; see *Donovan v. RRL Corp. (2001) 26 Cal. 4th 261, 278, 294, 109 Cal. Rptr. 2d 807, 27 P.3d 702* (defendant satisfied requirements for rescission of contract on ground of unilateral mistake of fact, when evidence established that mistake was made in good faith, defendant did not bear risk of mistake, and enforcement of contract would be unconscionable)].
- If the consideration for the obligation of the rescinding party fails, in whole or in part, through the fault of the party against whom the rescission is exercised [*Civ. Code § 1689(b)(2)*].
- If the consideration for the obligation of the rescinding party becomes entirely void from any cause [*Civ. Code § 1689(b)(3)*].

- If the consideration for the obligation of the rescinding party fails in a material respect from any cause before it is rendered to the rescinding party [*Civ. Code § 1689(b)(4)*].
- If the contract is unlawful for causes that do not appear in its terms or conditions, and the parties are not equally at fault [*Civ. Code § 1689(b)(5)*].
- If the public interest will be prejudiced by permitting the contract to stand [*Civ. Code § 1689(b)(6)*].
- If the contract or conveyance involved was made by a person of unsound mind but who was not entirely without understanding before that incapacity was judicially determined [*Civ. Code § 1689(b)(7)*; see *Civ. Code § 39*].
- If the contract is a novation involving the substitution of the obligation of a third person in satisfaction of a former obligation [*Civ. Code § 1531(1)*], and the statutory right to rescind it applies [*Civ. Code § 1689(b)(7)*; see *Civ. Code § 1533*; see also § 77.20[3]].
- If consent to the contract was not freely given [*Civ. Code § 1689(b)(7)*; see *Civ. Code § 1566*].
- If a hirer of any thing uses it for any purpose other than the purpose for which it was hired [*Civ. Code § 1689(b)(7)*; see *Civ. Code § 1930*].
- If a ratification of the act of an agent was made without the consent required for contracting or with imperfect knowledge of the material facts of the transaction involved [*Civ. Code § 1689(b)(7)*; see *Civ. Code § 2314*].
- When provided for under any other statute [*Civ. Code § 1689(b)(7)*].

[b] Insurance Contract

In addition, the Insurance Code authorizes unilateral rescission in the following situations [*Civ. Code § 1689(b)(7)*]:

- When concealment would entitle an injured party to rescind an insurance contract [*Ins. Code §§ 331, 338*].
- When a false and material representation has been made [*Ins. Code §§ 359, 360*].
- When the other party has violated a material warranty or other material provision of a policy [*Ins. Code § 447*].
- When an insured under a policy of marine insurance has made an intentionally false representation [*Ins. Code § 1904*].
- When there has been an alteration in the use or condition of the subject of a fire insurance policy, in which case the insurer may rescind [*Ins. Code § 2030*].

[3] Home Solicitation Contracts

A "home solicitation contract or offer" is any contract or offer for goods or services that is made at some location other than business or trade premises for an amount exceeding \$25 [*Civ. Code § 1689.5(a)*]. "Home solicitation contract"

does not include any contract in which the consumer has rescission rights under the Truth in Lending Act [*see* 15 U.S.C. § 1635].

The buyer may cancel a home solicitation contract until midnight of the third business day after the day the buyer signs it [*Civ. Code* § 1689.6(a); *see also* *Civ. Code* § 1689.20 *et seq.* (similar statutory rescission rights for "seminar sales solicitation contracts"); *but see* *Civ. Code* § 1689.6(b), (c) (seven-day cancellation limit for contracts for personal emergency response units; seven-day cancellation limit for contracts for the repair or restoration of residential premises damaged by a disaster)]. The buyer has the right to cancel a home improvement contract [*see* *Bus. & Prof. Code* § 7151.2] until midnight of the third business day after the buyer receives a signed and dated copy of the contract or offer to purchase that complies with *Bus. & Prof. Code* § 1689.7 [*Bus. & Prof. Code* § 1689.6(a)(2)]. The buyer has the right to cancel a home service and repair contract or an offer to purchase written pursuant to *Bus. & Prof. Code* § 7159.10 (governing home service and repair contracts) until (1) the buyer receives a signed and dated copy of the service and repair contract that complies with the contract requirements for service and repair contracts [*see* *Bus. & Prof. Code* § 7159.10] and (2) the work begins [*Bus. & Prof. Code* § 1689.6(a)(3)(A)]. Service and repair contracts that do not conform to specified requirements [*see* *Bus. & Prof. Code* § 7159.10] are subject to the requirements of *Bus. & Prof. Code* § 7159, applicable to home insurance contracts, regardless of aggregate price [*Bus. & Prof. Code* § 1689.6(a)(3)(B); *see* *Bus. & Prof. Code* § 7159(e)(6) (three-day right to cancel)].

Although the statute uses the term "cancellation," it actually creates a right of rescission [*see* [6], *below*]. For further discussion, see Ch. 89, *Home Improvement and Specialty Contracts* .

[4] Home Equity Purchase Contracts

Contracts under which a person acquires title to any residence in foreclosure [*see* *Civ. Code* § 1695.1 (definition)] are subject to cancellation (actually rescission [*see* [6], *below*]) by the seller [*Civ. Code* § 1695.4(a)]. For further discussion, see Ch. 23, *Real Property Sales Agreements* .

[5] Rescission Under Truth in Lending Act

When a credit transaction provides for the retention of a security interest in a consumer's principal dwelling, the consumer has a right to rescind the transaction until midnight of the third business day after consummation of the transaction [15 U.S.C. § 1635(a); *see* *Beach v. Ocwen Federal Bank* (1998) 523 U.S. 410, 416-418, 118 S. Ct. 1408, 140 L. Ed. 2d 566 (examining expiration of right to rescind pursuant to 15 U.S.C. § 1635(f))]. For discussion, see Ch. 25, *Real Estate Loans* .

[6] Rescission Distinguished From Cancellation

There is a distinction between the terms "cancel" and "rescind" [*Pico Citizens Bank v. Tafco, Inc.* (1962) 201 Cal. App. 2d 131, 136, 19 Cal. Rptr. 905] . To cancel a contract means to abrogate all of it that remains unperformed, while rescission means restoration of parties to their former position. Cancellation refers to the state of things at the time of cancellation; rescission refers to the state of things existing when the contract was made [*Mamula v. McCulloch* (1969) 275 Cal. App. 2d 184, 197, 79 Cal. Rptr. 571 ; *see* *Grant v. Aerodraulics Co.* (1949) 91 Cal. App. 2d 68, 73, 204 P.2d 683] .

Legal Topics:

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

Contracts Law Remedies General Overview Contracts Law Remedies Rescission & Redhibition General Overview



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§ 77.23 Cancellation

[1] Different Uses of Term

The term "cancellation," as applied to contracts and obligations, has been used in different ways. It has been applied to the common law concept of termination of a contract for breach by the party not in breach [see [2], below]. The term has also been used in a broader sense to mean the abandonment, annulment, or abrogation of the contract, or in a narrower sense to refer to the physical destruction, defacement, or mutilation of an instrument. "Cancellation" has most frequently been defined in California case law to mean the abrogation of as much of a contract as remains unperformed [see *Mamula v. McCulloch* (1969) 275 Cal. App. 2d 184, 197, 79 Cal. Rptr. 571 ; see also § 77.22[6]]. In fact, the words "terminate," "revoke," and "cancel" have all been used synonymously to describe the latter idea [see *Grant v. Aerodraulics Co.* (1949) 91 Cal. App. 2d 68, 73, 75, 204 P.2d 683] .

The applicable California statute does not directly define cancellation but rather speaks in terms of its effects. Specifically, cancellation or destruction of a written contract, or of the signatures of the parties, with the intent to extinguish the obligation embodied in the contract, extinguishes it as to all parties consenting to the act [Civ. Code § 1699; see [4], below]. For clarity, legal accuracy, and convenience, this chapter will use "termination" when the cancellation comes about as a result of breach and "cancellation" in the sense in which that term is used in Civ. Code § 1699, except when those terms are used with respect to contracts for the sale of goods [see Com. Code §§ 2102, 2106(3), (4); see also [3], below].

[2] Termination of Contract for Breach

A contract remains in force until it has been terminated, either through the acts of the parties evidencing an abandonment of the contract or in accordance with its terms. Abandonment is a matter of intent and is ascertained from the facts of the case [*Busch v. Globe Industries* (1962) 200 Cal. App. 2d 315, 320, 19 Cal. Rptr. 441] . When one of the parties to a contract has breached it, the other party has the right and option to terminate it for cause and sue for damages [*B.L. Metcalf General Contractor, Inc. v. Earl Erne, Inc.* (1963) 212 Cal. App. 2d 689, 693, 28 Cal. Rptr 382] . The right of a non-breaching party to terminate a contract and claim discharge from his or her obligations under that contract depends on the materiality of the breach [see *Taliaferro v. Davis* (1963) 216 Cal. App. 2d 398, 412, 31 Cal. Rptr. 164] .

For notices to use in terminating a contract and discussion of breach of contract as a ground for termination, see §§ 77.360-77.362. Self-executing termination provisions are covered in Ch. 75, *Formation of Contracts and Standard Contractual Provisions*.

[3] Termination or Cancellation of Sale of Goods

In the case of a sale of goods, "cancellation" occurs when either party puts an end to the contract because of breach by the other [*Com. Code § 2106(4)*], while "termination" occurs when either party, pursuant to a power created by agreement or by law, puts an end to the contract for some other reason [*Com. Code § 2106(3)*]. On termination, all obligations which are still executory are discharged, but any right based on prior breach or performance survives [*Com. Code § 2106(3)*]. The effect of cancellation is the same as that of termination, except that the canceling party also retains any remedy for breach of the whole contract or any unperformed balance [*Com. Code § 2106(4)*]. For further discussion, see Ch. 52, *Sales of Goods Under the Uniform Commercial Code*.

[4] Cancellation or Destruction of Written Contract

[a] Act of Parties

Cancellation of a written contract extinguishes it as to all parties consenting to the act [*Civ. Code § 1699*]. That is, it abrogates all of a contract that remains unperformed. A cancellation agreement does away with all of the prior agreement that remains unperformed, on the terms and conditions set forth in the cancellation agreement [*Mamula v. McCulloch* (1969) 275 Cal. App. 2d 184, 197, 79 Cal. Rptr. 571]. The parties must intend that the cancellation or destruction of the contract or signatures will have the effect of extinguishing the obligations under the contract [*Civ. Code § 1699*].

If a party who is entitled to any benefit under a contract intentionally destroys, cancels, or materially alters that contract, all executory obligations owed to that party by nonconsenting parties are extinguished [*Civ. Code § 1700*]. However, this rule does not apply when only one of duplicate copies of a contract is canceled, destroyed, or materially altered [*Civ. Code § 1701*].

[b] Court-Ordered Cancellation

The type of cancellation described in [a], above, differs from cancellation of instruments by court order. Cancellation of an instrument by court order is an equitable remedy [*Strong v. Strong* (1943) 22 Cal. 2d 540, 546, 140 P.2d 386 (quiet title action)] authorized by statute to relieve a reasonable apprehension that, if left outstanding, the instrument might cause serious injury to one against whom it is void or voidable [*Civ. Code § 3412*]. Typically, actions for cancellation by court order involve instruments affecting real property [see, e.g., *Jones v. Adams Financial Services* (1999) 71 Cal. App. 4th 831, 835-840, 84 Cal. Rptr. 2d 151 (in action to cancel note and deed of trust based on fraud in execution brought by elderly woman who was blind and suffered from dementia, court denied loan broker's petition to compel contractual arbitration)]. For further discussion, see California Forms of Pleading and Practice, Ch. 107, *Cancellation of Instruments* (Matthew Bender).

Legal Topics:

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

Contracts LawContract ModificationsGeneral OverviewContracts LawPerformanceGeneral Overview



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[Reserved]

§§ 77.24[Reserved]



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PART III. TRANSACTION GUIDE

A. Client Interview--Facts and Documents

27-77 California Legal Forms--Transaction Guide § 77.100

§ 77.100 Basic Facts Concerning All Transactions

1. Client's name, address, and telephone number.
2. Nature of obligation that client wishes to discharge.
3. If obligation arises from instrument or oral agreement:
 - a. Nature of document (if any):
 - (1) Contract;
 - (2) Note; or
 - (3) Preexisting release.
 - b. Date of execution.
 - c. Whether obligation is owed by or to more than one person.
 - d. Material terms of promise and performance.
 - e. Consideration:
 - (1) Valuation.
 - (2) Whether or not it was actually given.

- f. Whether any remedies for breach are provided in contract itself (including liquidated damages or penalties).
 - g. Whether any party has already performed all or any part of that party's obligation.
4. If obligation arises from tort, details of any occurrence that is material to, or allegedly gave rise to, that obligation:
- a. Time and place of occurrence.
 - b. Parties involved and their activities.
5. Names, addresses, and telephone numbers of all relevant parties:
- a. Other parties to contract or dispute.
 - b. Attorneys for other parties.
 - c. Insurance representatives, if applicable.
 - d. Appraisers, suppliers, or other experts required for valuation of property, contract rights, or personal injuries.
 - e. Key personnel involved in performance on behalf of parties or responsible on their behalf in implementing contract, and their relationships to parties.
 - f. Third parties involved in rendering performance contemplated by contract.
 - g. Third-party beneficiaries.
 - h. Customers and suppliers who might be incidentally benefitted or otherwise affected by performance.
6. Manner in which client wishes to discharge obligation:
- a. By performing or offering to perform original obligation [*see § 77.101*].
 - b. By agreeing with other party to provide or accept, in extinction of original obligation, something different from or less than that to which obligee is entitled [*see § 77.102*].
 - c. By resolving dispute over nature, terms, or adequacy of performance of obligation [*see § 77.103*].
 - d. By entering agreement, based on prior transactions between parties, that all items of account are true and that agreed-on balance is due and owing from one party to other [*see § 77.104*].
 - e. By modifying terms of existing obligation without abrogating it [*see § 77.106*].
 - f. By abrogating existing obligation and either:
 - (1) Substituting different obligation in its place [*see § 77.105*];
 - (2) Restoring all parties to their respective positions at time they entered into obligation

[see §§ 77.107, 77.108]; or

(3) Abrogating any remaining obligation [see §§ 77.109, 77.110].

7. Underlying motive or reason why client wishes to discharge obligation.

8. Whether other party or parties to obligation have agreed or are likely to agree to discharge of obligation in manner desired by client.

Legal Topics:

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

Contracts LawContract Conditions & ProvisionsGeneral OverviewContracts LawFormationGeneral Overview



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§ 77.101 Facts Concerning Performance and Excuse for Nonperformance

1. If client is obligor:

a. Whether client (or some person on client's behalf and with his or her consent) is willing and able to perform [*see* § 77.13].

b. If appropriate, facts showing that client has been prevented from performing, either by obligee or some other cause [*see* §§ 77.14, 77.15].

2. Date performance was due [*see* § 77.13[8]].

3. If client is obligee: whether client is willing to accept tendered performance from other party or reasons why not [*see* § 77.13[9]].

4. Number and nature of other obligations that obligor has to same obligee.

NOTE:

For discussion of the rules that determine how a tendered performance is to be applied when an obligor has more than one obligation to the same obligee [*Civ. Code* § 1479], and a form specifying the order of application, see § 77.211.

5. If client is one of several obligors: names and addresses of other obligors.

NOTE:

Although the performance of an obligation by one of several persons who are jointly liable extinguishes the liability of all of them [*Civ. Code* § 1474], the client may desire to perform and then pursue a cause of action against the other obligors.

6. If client is one of several obligees [see § 77.12[2]]:

- a. Names and addresses of other obligees.
- b. Manner of performance desired by client.

NOTE:

An obligation to one of several obligees is extinguished by performance rendered to any of them (except in the case of a deposit made by owners in common or joint ownership) [*Civ. Code* § 1475].

7. Nature of any partial performance given by client [see § 77.12[3]].

Legal Topics:

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A. Client Interview--Facts and Documents

27-77 California Legal Forms--Transaction Guide § 77.102

§ 77.102 Facts Concerning Accord and Satisfaction

1. If client is obligor:

a. Whether client is willing to offer:

(1) Partial performance of existing obligation; or

(2) Performance that differs from that contracted for.

b. Nature or amount of consideration that client desires to offer to validate offered accord.

2. If client is obligee, whether client is willing to accept differing performance and obligor's new consideration.

Legal Topics:

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

Contracts Law Performance Accord & Satisfaction



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A. Client Interview--Facts and Documents

27-77 California Legal Forms--Transaction Guide § 77.103

§ 77.103 Facts Concerning Settlement and Release

1. Existence and nature of dispute between parties.

NOTE:

A compromise and settlement differs from an accord and satisfaction in that compromise and settlement comes into play only when there is a difference between the parties with respect to the obligation and mutual concessions are made [*see* § 77.16[4]].

2. Whether client is willing to make mutual concessions, arrive at compromise agreement, and thus bar any future reopening of dispute.

NOTE:

In general, a compromise agreement bars the reopening of the original controversy [*see* § 77.16[4]].

3. Whether client desires to relinquish claim by executing release [*see* § 77.18].

4. If there is any likelihood that client's release will cover claims that obligee does not know or suspect to exist at time of execution [*see* § 77.240[1]:

a. Whether possibility of future claims has been discussed with client (for example, if claim involves personal injury, whether subject of present personal injuries and their after-effects have been discussed).

b. Whether client consciously or knowingly intends to release those claims.

5. If insurance carrier is involved, whether client is willing to waive any insurance bad faith claim that

client may have [see § 77.18[3]].

6. Number of debtors or joint tortfeasors [see § 77.18[5]].

Legal Topics:

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

Civil ProcedureSettlementsGeneral OverviewCivil ProcedureSettlementsReleases From LiabilityGeneral
OverviewContracts LawTypes of ContractsReleasesContracts LawTypes of ContractsSettlement Agreements



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A. Client Interview--Facts and Documents

27-77 California Legal Forms--Transaction Guide § 77.104

§ 77.104 Facts Concerning Account Stated

1. Nature of prior monetary transaction between client and other party [*see § 77.19[5]*].
2. Amount due under prior transaction.
3. Date of prior transaction [*see § 77.19[3]*].
4. Bargain that client desires to strike in account stated.

Legal Topics:

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

Contracts LawTypes of ContractsGeneral Overview



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A. Client Interview--Facts and Documents

27-77 California Legal Forms--Transaction Guide § 77.105

§ 77.105 Facts Concerning Novation

1. Nature or description of prior obligation between parties.
2. Type of substitution desired by client:
 - a. New obligation for prior one between same parties.
 - b. New obligor in place of original one with intent to release latter.
 - c. New obligee in place of original one, with intent to transfer rights of original to new obligee.
3. Status of new obligor, if novation substituting new obligor has occurred and client is obligee:
 - a. Whether new obligor is performing or being prevented from doing so by original obligor.
 - b. Whether new obligor is insolvent, and whether insolvency occurred:
 - (1) When obligee received new obligation; or
 - (2) Before obligee, acting with reasonable diligence, presented claim against new obligor.
4. Consideration for novation [*see § 77.20[7]*].

Legal Topics:

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



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A. Client Interview--Facts and Documents

27-77 California Legal Forms--Transaction Guide § 77.106

§ 77.106 Facts Concerning Modification

1. Whether existing contract is oral or written [*see* § 77.21[2], [3]].
2. Nature of desired modification.

NOTE:

A "modification" by mutual agreement may alter the obligations of the parties if it does not delete any of the elements essential to the validity of the original contract [*see* § 77.21[1]].

3. Consideration to be offered or given for modification.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawContract ModificationsGeneral Overview



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A. Client Interview--Facts and Documents

27-77 California Legal Forms--Transaction Guide § 77.107

§ 77.107 Facts Concerning Mutual Rescission

1. Conditions that have led parties to desire mutual rescission.
2. Consideration exchanged to date.
3. Whether anyone has breached contract yet and nature of breach.
4. Exactly what each party intends as effect of rescission, including position of parties regarding:
 - a. Consideration already received.
 - b. Other obligations under rescinded contract.
5. Information concerning any third-party beneficiaries to contract:
 - a. Names and addresses.
 - b. Any actions taken with respect to contract.
 - c. Reason for contract when it was made.
 - d. Whether third party is creditor beneficiary or donee beneficiary.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts Law Remedies Rescission & Redhibition General Overview



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27-77 California Legal Forms--Transaction Guide § 77.108

§ 77.108 Facts Concerning Unilateral Rescission

1. Factual support for existence of grounds that would form valid basis for unilateral rescission of contract [see § 77.123]:
 - a. Facts indicating that client's consent was given by mistake.
 - b. Facts indicating that client's consent was obtained through any of following exercised by or with connivance of other party or of any other party to contract jointly interested with party against whom rescission is to be exercised:
 - (1) Duress;
 - (2) Menace;
 - (3) Fraud; or
 - (4) Undue influence.
 - c. Facts indicating that consideration for client's obligation has failed (in whole or in part) through other party's fault.
 - d. Facts indicating that consideration for client's obligation has become entirely void from any cause.
 - e. Facts indicating that consideration for client's obligation failed in material respect from any cause before it was rendered to client.
 - f. Facts indicating that contract was unlawful for causes that do not appear in its terms or conditions, and

parties are not equally at fault.

g. Facts indicating that public interest will be prejudiced by permitting contract to stand.

h. Facts indicating that contract or conveyance involved was made by one of unsound mind who was not entirely without understanding before that incapacity was judicially determined.

i. Facts indicating that contract involves substitution of obligation of third person in satisfaction of former obligation [see § 77.20[6]].

j. Facts indicating that contract is for hire of some thing, and hirer has used it for purpose other than purpose for which it was hired.

k. Facts indicating that obligation arises from ratification of act of agent given without consent required for contracting or with imperfect knowledge of material facts of transaction involved.

l. Respecting insurance policy, facts indicating whether:

(1) There was concealment of facts by any party [Ins. Code §§ 331, 338].

(2) Any false and material representation has been made [Ins. Code §§ 359, 360].

(3) Other party has violated material warranty or other material provision of policy [Ins. Code § 447].

(4) Insured under marine insurance policy has made intentionally false representation [Ins. Code § 1904].

(5) There has been alteration in use or condition of matter insured under fire insurance policy [Ins. Code § 2030].

m. Date of execution of contract, if contract is either:

(1) Home solicitation contract [see Ch. 89, *Home Improvement and Specialty Contracts*];

(2) Home equity purchase contract [see Ch. 23, *Agreements to Sell Real Property*]; or

(3) Used in consumer credit transaction subject to right of rescission under Truth in Lending Act [see Ch. 25, *Real Estate Loans*].

2. How long client has known facts forming basis for desire to rescind [see § 77.340[1][f]].

3. If substantial period has elapsed since client learned facts that allow rescission [see § 77.340[1][g]]:

a. Whether client was subjected to duress, menace, or undue influence during that time.

b. Whether client was under disability during that time.

c. Whether client had good reason for lack of awareness that facts forming basis for claim were valid

basis for rescission.

d. Whether delay has caused other parties any injury.

4. Amount or type of consideration exchanged to date.

5. Change in value of consideration given, because of:

a. Market fluctuations;

b. Expenditure; or

c. Depreciation by:

(1) Normal wear; or

(2) Negligent or intentionally inflicted damage.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts Law Remedies Rescission & Redhibition General Overview



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A. Client Interview--Facts and Documents

27-77 California Legal Forms--Transaction Guide § 77.109

§ 77.109 Facts Concerning Cancellation of Contract

NOTE:

The term "cancellation" is used in this chapter to mean the destruction or cancellation of a written contract with the intent to extinguish the obligations of all parties consenting to that act [*see Civ. Code § 1699; § 77.23[4]*]. The abrogation of a contract for breach is more accurately termed "termination" [*see §§ 77.23[1], [2], 77.110*].

1. Terms and conditions for cancellation that client desires to set forth in cancellation agreement.
2. Names and addresses of persons, other than parties consenting to cancellation, who may be affected by cancellation.

NOTE:

Cancellation does not extinguish obligations under the contract to parties not consenting to the cancellation [*see Civ. Code § 1699*]. If a party who is entitled to any benefit under a contract intentionally destroys, cancels, or materially alters that contract, all executory obligations owed to that party by nonconsenting parties are extinguished [*Civ. Code § 1700*]. However, that rule does not apply when only one of duplicate copies of a contract is canceled, destroyed, or materially altered [*Civ. Code § 1701*].

Legal Topics:

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



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27-77 California Legal Forms--Transaction Guide § 77.110

§ 77.110 Facts Concerning Termination of Contract for Breach

NOTE:

While it is commonly stated that "cancellation" is the remedy for breach of a contract, the remedy is more accurately referred to as "termination" [*see* § 77.23[2]].

1. Facts on which client bases claim that other party breached contract.

NOTE:

When one of the parties to a contract has breached it, the other party has the right and option to terminate it for cause and sue for damages [*B.L. Metcalf General Contractor, Inc. v. Earl Erne, Inc. (1963) 212 Cal. App. 2d 689, 693, 28 Cal. Rptr. 382*] .

2. Facts indicating that claimed breach is material [*see* § 77.126].

NOTE:

The right to terminate a contract and claim discharge from one's obligations under that contract will depend on the materiality of the breach [*see Taliaferro v. Davis (1963) 216 Cal. App. 2d 398, 412, 31 Cal. Rptr. 164*] .

Legal Topics:

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



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27-77 California Legal Forms--Transaction Guide § 77.111

§ 77.111 Documents

1. Instrument under which obligation or dispute arose.
2. Related or supplemental documents, including modifications and alterations of underlying contract.
3. Formal notices from parties to each other rendered in accordance with contract or legal requirements.
4. Notes and records made by client concerning formation, execution, or performance of underlying contract, including:
 - a. Written recollections of parties and other interested individuals concerning understandings serving as basis of contract or as to performance during contract.
 - b. Notes summarizing informal communications between parties or their participating personnel in any way relating to contract.
 - c. Notices and communications received from third parties indirectly involved in contract or its performance.
5. Insurance policies covering matters that are subject of disputed loss or damage, including title, liability, and health, as well as any applicable surety bonds.
6. Documents relating to need for and utility of performance under contract or loss as result of its breach, such as:
 - a. Photographs.

- b. Maps or diagrams.
 - c. Lists of commodities or services involved under contract.
7. Bids and other offers from alternative sources with whom client might have contracted as of original date of contract, or with whom client might contract for future or replacement performance.
8. If personal injury is subject of dispute:
- a. All medical or mental examination reports, including x-rays, test results, consultant reports.
 - b. All reports from experts who examined cause of injury.
 - c. Complete client file (for example, attorney-client agreement, record releases, correspondence).
9. Bills, loss inventories, or estimates of repairs or services, connected with any damage in dispute.

Legal Topics:

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

Contracts LawContract Conditions & ProvisionsGeneral OverviewContracts LawTypes of ContractsGeneral Overview



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27-77 California Legal Forms--Transaction Guide §§ 77.112-77.119

[Reserved]

§§ 77.112[Reserved]



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NOTE:

If the obligation in question arises from a contract for the sale of goods, see Ch. 52, ***Sales of Goods Under the Uniform Commercial Code***, for the special requirements applicable to those contracts [*see* § 77.10[2]].



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27-77 California Legal Forms--Transaction Guide § 77.120

§ 77.120 Performance or Excuse for Nonperformance

1. Has obligation been performed by obligor and accepted by obligee?

NOTE:

Generally, full performance of an obligation by the obligor or any other person on the obligor's behalf and with the obligor's consent extinguishes the obligation if it is accepted by the obligee [*Civ. Code* § 1473; *see* § 77.12].

a. Does obligor's performance conform to that required by terms of obligation with respect to:

(1) Nature, type, or quality of performance?

(2) Amount or quantity?

(3) Time of performance?

(4) Place of performance?

(5) Any other conditions for performance imposed by original obligation?

b. Does obligor have to do anything else to satisfy all terms and conditions of original obligation?

c. Has obligee accepted obligor's performance in discharge of obligation?

2. If obligation has not actually been performed and accepted, has client made offer (tender) of performance with intent to extinguish his or her obligation?

- a. Was offer for "full" performance?
 - b. Was offer timely made?
 - c. Did other party refuse to accept offered performance [*see Civ. Code §§ 1485, 1486; § 77.13; see also § 77.210[1][d]*]?
3. If there has been neither performance nor offer of performance, is there any excuse for nonperformance?
- a. Has obligee prevented performance or offer of performance [*see § 77.14[2]*]?
 - b. Is performance or offer prevented by law [*see § 77.14[2]*]?
 - c. Has prevention of performance or prevention of offer of performance been induced by obligee [*see § 77.14[3]*]?
 - d. Have superhuman causes or public enemies prevented performance or offer of performance [*see § 77.14[4]*]?
 - e. Has obligee refused to accept performance even before it was offered [*see § 77.15[1]*]?

Legal Topics:

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

Commercial Law (UCC)Sales (Article 2)PerformanceGeneral OverviewContracts LawPerformanceGeneral Overview



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27-77 California Legal Forms--Transaction Guide § 77.121

§ 77.121 Contract Changes (Accord and Satisfaction, Novation, and Modification)

NOTE:

For the purpose of this section, "contract change" covers accord and satisfaction, novation, and modification.

1. Does obligor desire to offer some performance (as distinguished from promise) different from or less than that involved in original obligation, and will obligee accept it in satisfaction of obligation?

a. Would there be valid consideration to support accord and satisfaction [*see* § 77.16[6][e]]?

b. Will partial performance constitute adequate consideration for accord and satisfaction [*see* § 77.16[6][g]]?

NOTE:

If so, an accord and satisfaction should be used. Accord and satisfaction requires completed performance. The substitution of one promise for another is either a novation or a modification [*see* § 77.16; *see also* § 77.220 et seq. (forms)].

2. Will settlement or dealings between parties require or result in modification of existing contract?

NOTE:

A "modification" is an agreement by the parties to an existing contract, altering their obligations without deleting any of the elements essential to the validity of the original contract [*Carlson, Collins, Gordon & Bold v. Banducci* (1967) 257 Cal. App. 2d 212, 223, 64 Cal. Rptr. 915] . Such an agreement is not a rescission [*Travelers Ins. Co. v. Workmen's Comp. App. Bd.* (1967) 68 Cal. 2d 7, 17, 64 Cal. Rptr.

440, 434 P.2d 992 (oral agreement); *see* § 77.21].

a. Will assent to modification be mutual [*see* § 77.21[5]]?

b. Will consideration be required?

NOTE:

If the contract is oral, it may be modified with the written consent of parties without new consideration [*Civ. Code* § 1697]. If the contract is written, it may be modified by [*see* § 77.21[3]] either a written contract [*Civ. Code* § 1698(a)] or an oral agreement, to the extent that the oral agreement is executed by the parties [*Civ. Code* § 1698(b)].

c. Is contract for sale of goods?

NOTE:

No consideration is needed for modification of a contract for the sale of goods [*Com. Code* § 2209].

d. If consideration is required for modification, is there adequate new consideration to support modification [*see* § 77.21[4]]?

3. If parties prefer to substitute new obligation for existing one [*see* § 77.20; *see also* § 77.280 et seq. (forms)] (rather than arriving at compromise and settlement of existing obligation [*see* § 77.122]):

a. Is novation feasible, through any of following:

(1) Substitution of new obligation for original one between same parties with intent to extinguish old obligation [*Civ. Code* § 1531(1)]?

(2) Substitution of new obligor in place of original one with intent to release latter [*Civ. Code* § 1531(2)]?

(3) Substitution of new obligee in place of original one with intent to transfer rights of original obligee to new obligee [*Civ. Code* § 1531(3)]?

b. Can consent of both parties be obtained freely [*Civ. Code* § 1565]?

c. Is there sufficient consideration for proposed novation [*see* § 77.20[7]]?

Legal Topics:

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

Contracts Law Contract Modifications General Overview Contracts Law Performance Accord & Satisfaction Contracts Law Performance Novation



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27-77 California Legal Forms--Transaction Guide § 77.122

§ 77.122 Compromise, Settlement, and Release of Obligation

1. If parties differ as to obligation owed:

a. Does obligor desire to offer some performance or promise to perform something different from or less than that involved in original obligation?

b. Will obligee concede and accept it in satisfaction of obligation?

NOTE:

In that case, a compromise and settlement agreement should be used to bar reopening of the original claim [*see* § 77.17].

2. Should compromise and settlement agreement be combined with release from liability under former obligation?

NOTE:

A release operates as a relinquishment of the original obligation or claim and is normally combined with the bar to reopening that claim implicit in the compromise and settlement agreement. In practice, a release is virtually always used with a compromise agreement [*see* § 77.17[5]].

3. Should release apply to unknown claims?

4. If release will extend to any unknown claims, will it be valid and enforceable as to such claims [*see* § 77.18[2], [3]]?

a. Does amount of proposed consideration reflect risk of existence of unknown claims?

b. Does settlement result from bargaining and negotiation?

c. How close is issue of liability?

d. In personal injury cases:

(1) Has subject of future personal injuries been discussed?

(2) Would any future contention that injuries were in fact unknown when release was executed be reasonable?

5. If matter involves joint tortfeasors and is in litigation, would settlement with one or more (but not all) of them be in good faith?

a. Is amount of settlement within reasonable range of settling tortfeasor's proportional share of comparative liability for other party's injuries?

b. Does settlement comport with financial conditions and policy limits of settling party?

c. Is there any collusion, fraud, or tortious conduct aimed at injuring interests of nonsettling parties?

6. How should attorney-client contingency fee agreement provide for payment to attorney in event settlement is structured to provide for initial and succeeding installment payments:

a. Specified percentage of lump sum only;

b. Specified percentage of lump sum and of each installment;

NOTE:

This method may be imposed in the absence of any specific agreement [*Sayble v. Feinman* (1978) 76 Cal. App. 3d 509, 514, 142 Cal. Rptr. 895] .

c. Specified percentage of lump sum and present value of all installments; or

d. Specified percentage of lump sum and of cost of annuity?

Legal Topics:

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

Civil Procedure Settlements Releases From Liability General Overview Civil Procedure Settlements Settlement Agreements General Overview Contracts Law Types of Contracts Releases Contracts Law Types of Contracts Settlement Agreements



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B. Preliminary Determinations

27-77 California Legal Forms--Transaction Guide § 77.123

§ 77.123 Exculpatory Release From Future Claims

NOTE:

An exculpatory release is often used by businesses offering services that carry an inherent element of hazard or risk, and by other businesses that want to insulate themselves from liability to the maximum possible extent.

1. Does nature of client's business suggest use of release from future simple negligence or strict liability ("exculpatory release")?
2. Is proposed object of exculpatory release against public policy because its effect would be to exempt one from responsibility for his or her own:

NOTE:

A release with any of the following objects is against public policy [*Civ. Code* § 1668; *see, e.g., Health Net of California, Inc. v. Department of Health Services* (2003) 113 Cal. App. 4th 224, 226-227, 6 Cal. Rptr. 3d 235 (contractual clause that prohibited any recovery of damages, but not equitable relief, for any violation of statutory or regulatory law not made part of the parties' contractual obligations was held invalid under *Civ. Code* 1668)].

- a. Fraud?
- b. Willful injury to another's person or property?
- c. Violation of law?

3. If subject matter of proposed release is not against public policy, does it affect public interest?

NOTE:

Exculpatory releases that govern the private affairs of the parties are valid unless they also affect the public interest [*see* § 77.18[6][a]]. An exculpatory release that affects the public interest is invalid [*see* § 77.18[6][b]]. An exculpatory release may affect the public interest if it exhibits any of the following characteristics.

- a. Does release concern business suitable for public regulation?
- b. Does party seeking exculpation perform service:
 - (1) Of great importance to public?
 - (2) That is often matter of practical necessity for some members of public?
- c. Does party seeking release hold itself out as willing to perform that service for:
 - (1) Any person who seeks it?
 - (2) Any person coming within established standards?
- d. As result of essential nature of service, in economic setting of transaction, does party seeking release possess decisive bargaining strength against members of public seeking its services?
- e. In exercising superior bargaining power, does party seeking release propose to:
 - (1) Confront public with standardized adhesion contract of exculpation?
 - (2) Make no provision for additional protection against negligence through additional reasonable fee?
- f. As result of transaction, is person or property of other party placed under control of party seeking release, subject to risk of carelessness by that party or its agent?

4. If exculpatory release appears to be both warranted in circumstances and potentially valid, would best way to present client's customers with release be to:

- a. Incorporate exculpatory clause into standard contract for client's goods or services?

NOTE:

For discussion and a sample exculpatory provision that can be incorporated into a contract, lease, or other instrument, see Ch. 75, ***Formation of Contracts and Standard Contractual Provisions***.

- b. Use separate exculpatory agreement to be presented to and signed by client?

NOTE:

For an example of such a form, and discussion, see § 77.250. While a separate agreement

does call attention to the fact that the obligor is attempting to minimize liability, it may actually be an advantage inasmuch as it also provides clearer evidence that the obligee was aware of the existence and scope of the release.

Legal Topics:

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

Civil Procedure Settlements Releases From Liability General Overview Contracts Law Types of Contracts Releases



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B. Preliminary Determinations

27-77 California Legal Forms--Transaction Guide § 77.124

§ 77.124 Account Stated

1. Is there preexisting financial arrangement or account involving liquidated claim by one party against other?

NOTE:

An account stated cannot be created when the underlying debt is embodied in an express contract such as a promissory note, or when the debt is predicated on the breach of the terms of an express contract [*More v. Bartholomae Corp. (1945) 69 Cal. App. 2d 474, 477-478, 159 P.2d 436*] .

2. Does obligee need account stated so as to:

- a. Affirm that all items of account are true and that balance is due and owing?
- b. Restate account and balance due in order to keep original agreement from becoming stale under statute of limitations?
- c. Restate obligation on his or her own terms?

NOTE:

When any of the foregoing purposes might be served, an account stated is an appropriate method. For discussion of accounts stated and appropriate forms, see §§ 77.290-77.300.

3. Has account stated already been rendered, and, if so, has other party:

- a. Expressly or implicitly agreed to amount indicated in statement of account?

b. Objected to statement of account [*see* § 77.210]?

4. If account stated has been rendered and apparently agreed to, is there any element of fraud or mistake that could negate that agreement?

Legal Topics:

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

Contracts LawDebtor & Creditor RelationsContracts LawTypes of ContractsGeneral Overview



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DIVISION V: CONTRACTS AND OBLIGATIONS

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B. Preliminary Determinations

27-77 California Legal Forms--Transaction Guide § 77.125

§ 77.125 Rescission

1. Are all parties willing to rescind?

NOTE:

Rescission may be by mutual agreement [*Civ. Code § 1689(a)*]. For a form and discussion, see § 77.330.

2. Is there factual basis for client to rescind on ground of mistake?

NOTE:

The consent of contracting parties must be free, otherwise the contract will be voidable and subject to rescission [*Civ. Code §§ 1565, 1566, 1689(b)(1)*]; **see** *Donovan v. RRL Corp.* (2001) 26 Cal. 4th 261, 278, 294, 109 Cal. Rptr. 2d 807, 27 P.3d 702 (defendant satisfied requirements for rescission of contract on ground of unilateral mistake of fact, when evidence established that mistake was made in good faith, defendant did not bear risk of mistake, and enforcement of contract would be unconscionable); *Harris v. Rudin, Richman & Appel* (2002) 95 Cal. App. 4th 1332, 1338-1341, 116 Cal. Rptr. 2d 552 (reversing summary judgment for plaintiff because defendants raised triable issues of fact as to whether they were entitled to rescind settlement agreement based on mutual mistake regarding version of Probate Code section applicable to malpractice action)]. Consent of a party is not free when given by mistake [*Civ. Code § 1567*]. For further discussion of mistake as a ground for rescission, and alternative clauses indicating different types of mistake as grounds, see § 77.350.

a. Could consent have been obtained in absence of mistake?

NOTE:

Consent will only be deemed to have been given by mistake if it could not have been obtained in the absence of the mistake [*Civ. Code* § 1568].

b. Was mistake material, that is, does it affect execution and material elements of contract?

c. Was mistake one of fact [*Civ. Code* § 1577], that is:

(1) Unconscious ignorance or forgetfulness of fact material to contract?

(2) Belief in material fact that is not actually true?

d. Did mistake of fact result from party's neglect of legal duty?

NOTE:

In that case, the mistaken party will not be able to rescind the contract [*Civ. Code* § 1577]. However, ordinary negligence will not be considered neglect [*Van Meter v. Bent Construction Co. (1956) 46 Cal. 2d 588, 595, 297 P.2d 644*] .

e. Was mistake of fact mutual?

NOTE:

If so, either party may rescind the contract [*In re Barton's Estate (1950) 96 Cal. App. 2d 234, 214 P.2d 857*] .

f. Was mistake one of law [*Civ. Code* § 1578]?

(1) Did parties mutually misapprehend legal requirements bearing on material point [*Civ. Code* §§ 1566, 1567, 1578(1)]?

(2) If only one party made mistake [*Civ. Code* § 1578(2)]:

(a) Were other parties aware of that misapprehension?

(b) Did they do nothing to correct it?

3. Could client rescind on ground of duress?

NOTE:

Duress is a ground for rescission of a contract [*Civ. Code* § 1689(b)(1)]. For discussion and a form, see § 77.351.

a. Was there unlawful confinement of party who seeks rescission or that party's spouse, descendant, ancestor, or adopted child [*Civ. Code* § 1569(1)]?

b. Was there any such confinement of any such person in lawful form, but with unlawful or fraudulent purpose [*Civ. Code* § 1569(3)]?

c. Was there unlawful detention of property belonging to any of persons described above [*Civ. Code* § 1569(2)]?

4. Could client rescind on ground of menace?

NOTE:

Menace is a ground for rescission of a contract [*Civ. Code § 1689(b)(1)*]. For discussion and a form, see § 77.351.

- a. Was there threat of duress of person?
- b. Was there threat of unlawful and violent injury to person or property of party who seeks rescission or that party's spouse, descendant, ancestor, or adopted child [*Civ. Code § 1570(2)*]?
- c. Was there threat of injury to character of any of above persons [*Civ. Code § 1570(3)*]?
- d. Was there threat to injure rescinding party's business or property?
- e. Was threat of criminal prosecution made in order to compel rescinding party to sign contract, and was it successful in suppressing free consent necessary for binding contract?

5. Could client rescind on ground that his or her consent was obtained as result of undue influence?

NOTE:

"Undue influence" is the use, by a domineering party, of any authority he or she may have over a subservient party, or of any confidence that the subservient party has in the domineering party, in order to gain an unfair advantage over the subservient party [*Civ. Code § 1575(1)*]. Undue influence may also occur if the domineering party takes unfair advantage of the subservient party's weakness of mind [*Civ. Code § 1575(2)*] or takes a grossly oppressive and unfair advantage of the subservient party's necessities or distress [*Civ. Code § 1575(3)*]. For further discussion of undue influence, and a clause for use in a notice of rescission stating undue influence as a basis for rescission, see § 77.352.

- a. Are there any facts present that might accompany undue influence, such as:

- (1) Discussion of transaction at unusual or inappropriate time?
- (2) Consummation of transaction in unusual place?
- (3) Insistent demand that parties' business be finished at once?
- (4) Extreme emphasis on untoward consequences of delay?
- (5) Use of multiple persuaders by domineering party against single subservient party?
- (6) Absence of independent advisers to subservient party?
- (7) Statements that there is no time to consult financial advisers or attorneys?

- b. Has domineering party exercised authority over party seeking rescission, to gain unfair advantage over subservient party [*Civ. Code § 1575(1)*]?

c. Has domineering party used or exercised any confidence that subservient party had in domineering party to gain unfair advantage over subservient party [*Civ. Code* § 1575(1)]?

d. Has domineering party taken unfair advantage of subservient party's weakness of mind [*Civ. Code* § 1575(2); *see* § 77.352[1][e]]?

e. Has domineering party taken grossly oppressive and unfair advantage of subservient party's necessities or distress [*Civ. Code* § 1575(3)]?

f. Are there present any fact situations giving rise to presumption of undue influence [*see* § 77.352[1][f], [g], [h], [i]], such as:

(1) Trustee-beneficiary relationship (except for trustee-beneficiary agreement concerning initial hiring of trustee [*see Prob. Code* § 16004])?

(2) Attorney-client relationship (other than contract for retention of legal services)?

(3) Agent-principal relationship, when benefit is derived by agent in dealing with principal?

(4) Domestic and familial relationships, in which trust reposed in domineering party gave that party ability to gain at subservient party's expense?

(5) Friendships, when circumstances show relationship that might give friend ability to gain unfair advantage?

6. Can client rescind on ground that his or her consent was obtained as result of actual fraud [*see Civ. Code* §§ 1571, 1689(b)(1); § 77.353[1]]?

a. Are any elements of actual fraud present [*Civ. Code* § 1572], such as:

(1) Suggestion, as fact, of that which is not true, by one who does not believe it to be true?

(2) Positive assertion, in manner not warranted by information of person making it, of that which is not true, even if that party believes it is true [*see, e.g., Anderson v. Deloitte & Touche* (1997) 56 Cal. App. 4th 1468, 1476-1477, 66 Cal. Rptr. 2d 512 (trial issues precluded summary judgment on negligent misrepresentation claim against accountants)]?

(3) Suppression of that which is true by one having knowledge or belief of fact?

(4) Promise made without any intention of performing it?

(5) Any other act to deceive?

b. Has there been misrepresentation of material fact that was [*see* § 77.353[1][c]]:

(1) Made with intent to induce reliance in another?

(2) Coupled with actual and justifiable reliance by other party, who was induced to act by belief in its truth?

c. Did client actually and justifiably rely on misrepresentation?

(1) Was representation mere statement of opinion?

NOTE:

One may not rescind on the ground of fraud after relying on a mere statement of opinion. However, if the opinion or legal conclusion misrepresents material facts, then it will be treated as any other misrepresentation, and reliance will be justified [*Seeger v. Odell* (1941) 18 Cal. 2d 409, 414, 115 P.2d 977] . In addition, if the person giving the opinion or legal conclusion represents himself or herself as an expert or otherwise has superior knowledge of the subject, reliance is justified [*Pacesetter Homes, Inc. v. Brodtkin* (1970) 5 Cal. App. 3d 206, 213, 85 Cal. Rptr. 39 ; *Wilke v. Coinway, Inc.* (1967) 257 Cal. App. 2d 126, 136, 64 Cal. Rptr. 845] .

(2) Did client have reason to know that misrepresentation was false?

NOTE:

Reliance is not justified when the rescinding party had reason to know that the misrepresentation was false [*Snelson v. Ondulando Highlands Corp.* (1970) 5 Cal. App. 3d 243, 252, 84 Cal. Rptr. 800] .

(a) Did client make independent investigation of facts?

(b) Was investigation performed with reasonable care?

NOTE:

If the investigation is made by the rescinding party, and the falsity of the misrepresentation is not apparent without expert advice, his or her reliance on it will be justified [see § 77.353[1][e]].

d. Has client suffered damage as result of claimed actual fraud [see § 77.353[1][f]]?

7. Can client rescind on ground that his or her consent was obtained as result of constructive fraud?

NOTE:

Constructive fraud [see Civ. Code § 1571] is a ground for unilateral rescission [Civ. Code § 1689(b)(1); see § 77.353[1][c]]. A party is guilty of constructive fraud when his or her actions gain an advantage over another party by misleading the other party to that party's detriment [Civ. Code § 1573(1)].

a. Was there any breach of duty to client, with result that other party gained advantage by misleading client or anyone claiming under client [Civ. Code § 1573(1)]?

b. Was there any other act or omission that law specifically declares to be fraudulent [Civ. Code § 1573(2)]?

c. Was there any conduct by other party that, while not actually fraudulent, ought to be so treated because it had all consequences and legal effects of actual fraud [*Estate of Arbuckle* (1950) 98 Cal.

App. 2d 562, 568, 220 P.2d 950 ?

d. Has other party breached duty owed to client by virtue of confidential or fiduciary relationship?

NOTE:

Whenever a fiduciary or a person in a position of confidence gains an advantage over the party to whom the fiduciary duty is owed, the transaction is presumptively fraudulent, and the party who gained must bear the burden of proving that it was fair and made in good faith [*Boyd v. Bevilacqua* (1966) 247 Cal. App. 2d 272, 290, 55 Cal. Rptr. 610 (joint venturers as mutual fiduciaries); *see* § 77.352[1] (undue influence and types of confidential and fiduciary relationships)].

Legal Topics:

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

Contracts Law Remedies Rescission & Redhibition General Overview



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B. Preliminary Determinations

27-77 California Legal Forms--Transaction Guide § 77.126

§ 77.126 Termination for Breach and Cancellation

1. Has other party to contract breached it so materially as to justify termination, that is:

- a. Is other party's failure to perform his or her immediate obligation deliberate and unjustified?
- b. Does other party's act prevent client from performing his or her contractual obligation?
- c. Does breaching party's conduct prevent fulfillment of his or her own obligation?
- d. Has there been willful default going to whole of contract, even in absence of economic loss to client?

NOTE:

For discussion and a form for notice of termination for material breach, see § 77.360.

2. Has other party to contract committed anticipatory breach of contract, that is, made unequivocal declaration that he or she absolutely will not perform his or her obligation?

NOTE:

For discussion and a form for notice of termination of a contract by the nonrepudiating party to the party guilty of anticipatory breach or repudiation, see § 77.361.

3. If material breach has occurred, is portion of contract that has been breached severable from remainder of contract?

NOTE:

For discussion and a form for notice of termination of a severable portion of a contract for material

breach, see § 77.362.

4. Do parties desire to abrogate all unperformed obligations under contract between them, while not affecting any performance already rendered under contract?

5. If cancellation is intended, should method or methods of destruction or cancellation [*see Civ. Code §§ 1699-1701*] be:

a. Written cancellation agreement [*see § 77.370*]?

b. Physical destruction of all original copies of contract?

c. Obliteration of signatures of parties to contract?

NOTE:

In this chapter, the term "cancellation" is used to mean the destruction or cancellation of a written contract by the parties with intent to extinguish the obligation established by the contract [*see Civ. Code § 1699; § 77.370*].

Legal Topics:

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

Contracts LawBreachGeneral OverviewContracts LawPerformanceDischarges & Terminations



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[Reserved]

§§ 77.127[Reserved]



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NOTE:

If the obligation in question arises from a contract for the sale of goods, see Ch. 52, ***Sales of Goods Under the Uniform Commercial Code***, for the special requirements applicable to those contracts [*see* § 77.10[2]].



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27-77 California Legal Forms--Transaction Guide § 77.140

§ 77.140 Performance or Excuse for Nonperformance

1. If there is no excuse for nonperformance, tender full performance.

NOTE:

A tender is an offer of performance with intent to extinguish the obligation [*see Still v. Plaza Marina Commercial Corp. (1971) 21 Cal. App. 3d 378, 385, 98 Cal. Rptr. 414*]. Tender need not be accompanied by the thing to be delivered, unless the offer is accepted [*Civ. Code § 1496*]. An offer of performance must be made by the obligor, or by some person on the obligor's behalf and with the obligor's assent [*Civ. Code § 1487; see Civ. Code § 1474* (full performance of obligation by one joint obligee extinguishes liability of all)]. Tender of partial performance is of no effect for purposes of the statutes governing extinction of obligations through offer of performance [*Civ. Code § 1486*]. However, partial performance of an indivisible obligation extinguishes a corresponding proportion of the obligation if that performance is retained by the obligee [*Civ. Code § 1477*].

a. Tender performance to or for [*Civ. Code § 1488*]:

(1) Obligee;

(2) Any one of two or more joint obligees [*see Civ. Code § 1475*]; or

(3) Person authorized by one or more of obligees to receive or collect it.

b. Tender performance at any of following places [*Civ. Code § 1489*]:

(1) Any place designated by obligee;

(2) Wherever person to whom offer ought to be made can be found;

(3) If person cannot with reasonable diligence be found within California and within reasonable distance of person's business or residence, or if person evades obligor, then at person's residence or place of business within California; or

(4) If performance cannot be tendered in manner described above, then at any place in California.

c. Tender performance at following time:

(1) If possible, at time fixed for performance of obligation, if any, at reasonable hours [Civ. Code § 1490; but see Civ. Code § 1492 (offer of late performance)].

(2) If there is no fixed time for performance, at any time before there has been refusal to perform [Civ. Code § 1491].

d. Tender performance in good faith [Civ. Code § 1493].

NOTE:

The tender is of no effect if the obligor is not willing and able to perform [Civ. Code § 1495].

e. Tender performance unconditionally [Civ. Code § 1494], except that offer may be contingent on performance of any conditions precedent or concurrent to performance to which party offering performance is entitled [Civ. Code § 1498].

f. If performance is being tendered late (that is, after maturity of obligation), accompany tender with offer of sufficient compensation to compensate obligee for delay [see Civ. Code § 1492; see also § 77.213[2]].

g. If there are multiple obligations, specify how performance is to be apportioned among those obligations [see Civ. Code § 1479].

h. Memorialize tender of performance in written instrument, if desired, stating fact of tender and requiring obligee's written acceptance of offer, depending on whether:

(1) Tender is accompanied by physical delivery [see § 77.210[2]].

(2) Tender is accompanied by physical delivery and there are multiple obligations [see § 77.211[2]].

(3) Tender is not accompanied by actual physical delivery [see § 77.212[2]].

(4) Tender is made after maturity of obligation [see § 77.213[2]].

2. If tender of performance is accepted:

a. Render performance:

(1) On acceptance of tender [*see Civ. Code §§ 1495, 1496*]; and

(2) In manner directed by obligee [*see Civ. Code § 1476*].

b. If performance consists of money payment [*see Civ. Code § 1478*], either:

(1) Tender payment directly to obligee; or

(2) Deposit amount in obligee's name in reputable bank or savings and loan association in California, and notify obligee of deposit.

c. Require person to whom performance is rendered to sign written receipt for performance [*see Civ. Code § 1499; see § 77.200[2]*].

NOTE:

An obligor has the right to require a written receipt for any property delivered in performance of his or her obligation [*Civ. Code § 1499*]. The *form in § 77.200[2]* is a simple receipt that may be prepared by the obligor and presented to the obligee for signature at the time performance is rendered. The *forms in §§ 77.210[2] and 77.211[2]*, which are complete forms to memorialize the tender and acceptance of performance, include receipts.

3. If valid tender of performance is refused:

a. Treat obligation as terminated [*see Civ. Code § 1485*].

b. If desired, pursue appropriate remedies for breach of contract [*see Walker v. Houston (1932) 215 Cal. 742, 745, 12 P.2d 952*].

4. If there is excuse for nonperformance [*see § 77.120; see also Civ. Code § 1511 et seq.*], send letter to other party (if desired) stating facts constituting excuse for nonperformance.

NOTE:

Alternatively, the party claiming that performance has been excused may simply do nothing and wait for the other party to pursue any available remedies.

Legal Topics:

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

Commercial Law (UCC)Sales (Article 2)PerformanceGeneral OverviewContracts LawPerformanceGeneral Overview



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27-77 California Legal Forms--Transaction Guide § 77.141

§ 77.141 Accord and Satisfaction

1. If there is dispute between parties, and obligor desires to offer some performance that differs from or is less than that involved in original obligation, send contract [see § 77.220[2]] or letter [see § 77.221[2]] to obligee:

- a. Offering differing performance.
- b. Containing obligee's agreement or accord.
- c. Including obligee's receipt for obligor's performance of accord agreement as evidence of satisfaction.

2. If obligor desires to do so, use check or draft to accomplish accord and satisfaction by doing following [see § 77.230[2]]:

NOTE:

The tender of a check or draft in full discharge of a disputed or unliquidated claim is not an accord and satisfaction if the obligee protests against accepting the tender in full payment by striking out or otherwise deleting the notation on the instrument that states that it is offered in full discharge of the claim. The tender also does not constitute an accord and satisfaction if the acceptance of the check or draft was inadvertent or without knowledge of the notation [*Civ. Code § 1526(a)*]. The acceptance of a check or draft by an obligee does constitute an accord and satisfaction when the check or draft is issued pursuant to or in conjunction with a release of a claim [*Civ. Code § 1526(c)*].

- a. Include accord (agreed-on offer of performance) on check or draft used to tender payment and to operate as evidence of satisfaction [see § 77.230[2]].

b. If check or draft is tendered pursuant to composition or extension agreement, do following [Civ. Code § 1526(b)]:

NOTE:

A check or draft tendered pursuant to a composition or extension agreement [*see* Ch. 78, **Creditors' Agreements: Nonbankruptcy Alternatives**] constitutes an accord and satisfaction despite the provisions of Civ. Code § 1526(a) if the debtor takes the steps outlined below [Civ. Code § 1526(b)].

(1) Be sure that similar treatment is accorded to all obligees of same class.

(2) Ensure that obligee receives check or draft with knowledge of restriction by doing one of following [Civ. Code § 1526(b)(2)]:

(a) Require obligee to execute written consent to composition or extension agreement before obligee receives check or draft.

(b) Give obligee written notice, at least 15 days and not more than 90 days before he or she receives check or draft, that check or draft will be tendered with restrictive endorsement and that acceptance and cashing of check or draft will constitute accord and satisfaction.

NOTE:

Mailing this notice by first-class mail, postage prepaid, to the address shown for the obligee on the obligor's books or to any other address designated in writing by the obligee constitutes notice [Civ. Code § 1526(d)].

3. If obligation is undisputed, but obligor desires to offer, and obligee has agreed to receive, partial performance in complete satisfaction, either [*see* § 77.222[2]]:

a. Have obligee execute simple expression of acceptance by obligee of lesser performance in satisfaction of obligation; or

b. Use more elaborate accord and satisfaction agreement.

4. To avoid accord and satisfaction when cashing check or draft containing notation that it is offered in full payment of claim, protest by striking out or otherwise deleting notation [Civ. Code § 1526(a)].

NOTE:

If the protesting party wants to preserve any possible rights under the Commercial Code, add words of protest such as "without prejudice" or "under protest" in addition to striking out the notation on the check or draft [*see* Com. Code § 1308; *see also* § 77.230[1][c]].

Legal Topics:

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

Commercial Law (UCC)Sales (Article 2)PerformanceGeneral OverviewContracts LawPerformanceGeneral OverviewContracts LawPerformanceAccord & Satisfaction



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27-77 California Legal Forms--Transaction Guide § 77.142

§ 77.142 Compromise, Settlement, and Release

1. Obtain authority from client to settle disputed matter or claim [*see § 77.270[2]*].
2. If there is dispute between parties that has been compromised and settled, use compromise and settlement agreement combined with release.

a. If one party will make lump sum payment to another party:

(1) Use basic compromise and settlement agreement [*see § 77.260[2]*] when there is no cross-claim.

NOTE:

For a release to use when there is a single adverse party, either as part of a compromise and settlement agreement or independently, *see § 77.240[2]*.

(2) Use compromise and settlement agreement with mutual release of cross claims [*see § 77.261[2]*] when there is cross-claim.

- b. If settlement is to be made in increments rather than in lump sum payment, use structured settlement agreement [*see § 77.262[2]*].
 - c. If settlement is with some (but not all) of joint obligors, sliding scale settlement agreement may be used [*see § 77.263[2]* (joint tortfeasors)].
3. Include provisions in release relinquishing unknown claims [*see § 77.240[2]*], if appropriate.

NOTE:

A general release does not cover unknown claims that, if known by the obligee, would have materially

affected the settlement [*Civ. Code § 1542*]. However, that does not prevent settlements for unknown claims [*Casey v. Proctor* (1963) 59 Cal. 2d 97, 109, 28 Cal. Rptr. 307, 378 P.2d 579] . An obligee who is conscious and knows the significance of his or her act may intelligently release all unknown claims [*Casey v. Proctor* (1963) 59 Cal. 2d 97, 109, 28 Cal. Rptr. 307, 378 P.2d 579 ; *Carmichael v. Industrial Acc. Comm.* (1965) 234 Cal. App. 2d 311, 44 Cal. Rptr. 470] .

a. Do not word release of unknown claims by merely making general reference to unknown claims, without more.

b. Recite exact words of statute [*Civ. Code § 1542*] in provision, and have client initial quotation to indicate that he or she is aware of content of statutory provision.

NOTE:

While this device is not required by statute, it is wise to use it because it tends to show that the client was made aware of his or her legal rights and acted knowingly.

c. State obligee's understanding of significance and consequence of waiver of statute.

d. State obligee's assumption of risk of unknown claims.

e. If desired, add declaration of witness that obligee acknowledged full understanding of meaning and consequences of release.

NOTE:

While this device is not required by statute, it may be useful to show that the obligee acted with awareness of his or her legal rights.

f. If desired, add declaration of obligee's attorney that obligee fully understands effect, significance, and consequences of release.

4. If applicable, include provision reserving or relinquishing insurance bad faith claim [*see § 77.240[2]*].

NOTE:

Claims that an insurer has committed unfair claims settlement practices (that is, insurance bad faith claims) [*see Ins. Code § 790.03(h)*] are not necessarily released by a general release that names both a defendant and his or her insurer. When the release specifically excepts and reserves a plaintiff's right to assert a bad faith action, that right is not released [*Vega v. Western Employers Ins. Co.* (1985) 170 Cal. App. 3d 922, 926, 216 Cal. Rptr. 592] .

5. If release concerns personal injury claim, add declaration that at time of execution, client was neither patient in nor outpatient of medical facility for treatment of injury that gave rise to released claim [*see Bus. & Prof. Code § 6152(b)*; *see also § 77.240[1][g]*].

6. If parties' compromise provides for initial lump sum payment followed by installments (a structured settlement), use structured settlement agreement and release of other party [*see § 77.262[2]*].

7. If dispute is in litigation between plaintiff and joint tortfeasors, and settlement is reached with fewer than all of joint tortfeasors, consider use of sliding scale settlement agreement to limit settling defendant's liability to amount made dependent on amount that plaintiff can later recover from nonagreeing parties [*see § 77.263[2]*].

8. If client requires exculpatory release for use in his or her business, use anticipatory release of future claims [see § 77.250[2]; *see also* § 77.123].

Legal Topics:

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

Civil ProcedureSettlementsReleases From LiabilityGeneral OverviewCivil ProcedureSettlementsSettlement
AgreementsGeneral OverviewContracts LawTypes of ContractsReleasesContracts LawTypes of ContractsSettlement
Agreements



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27-77 California Legal Forms--Transaction Guide § 77.143

§ 77.143 Account Stated

1. If relationship of debtor and creditor exists between parties, and amount owed is liquidated claim, but claim is not embodied in express contract or is for breach of express contract, have creditor:

a. Create account stated demanding payment of amount stated as due, either by [*see § 77.290[2]*]:

(1) Letter stating balance claimed to be due; or

(2) Standard invoice listing separate items of account and stating total amount due.

b. Provide for assent by debtor; either:

(1) Lay foundation for implicit assent to amount stated by including request that debtor contact creditor if balance indicated does not agree with debtor's records [*see § 77.290[2]*]; or

(2) Add language expressing debtor's acceptance of account stated [*see § 77.291[2]*].

2. If client is debtor who has received account stated, have client place statement in nature of receipt on reverse of check used to pay account, in order to obtain creditor's acknowledgment of payment [*see § 77.300[2]*].

3. If client is debtor who has received account stated, and client objects to statement, send letter of objection to creditor [*see § 77.310[2]*].

Legal Topics:

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

Contracts LawDebtor & Creditor RelationsContracts LawTypes of ContractsGeneral Overview



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27-77 California Legal Forms--Transaction Guide § 77.144

§ 77.144 Novation

1. If parties to existing obligation intend to extinguish that obligation and desire to substitute new obligation between themselves, have them enter into novation agreement substituting obligations [*see* § 77.280[2]].
2. If obligor under original agreement desires relief from obligation by substituting third party who is willing to take obligor's place, and if obligee is satisfied with new obligor and is willing to release original obligor from that obligation [*see* § 77.281[2]], then:
 - a. Have original obligor and obligee agree to substitute new obligor in place of original obligor with respect to contract obligation.
 - b. Have new obligor promise to perform that obligation.
 - c. Have obligee agree to release and discharge original obligor from that obligation.
3. If current obligee intends to transfer his or her rights to new obligee and substitute new obligee in original obligee's place [*see* § 77.282[2]], then:
 - a. Have all parties, including obligor, agree to substitute new obligee in place of original obligee with respect to specified obligation.
 - b. Have obligor promise to render that obligation to new obligee rather than to original obligee.
 - c. Have all parties agree to transfer of all rights of original obligee with respect to that

obligation from original obligee to new obligee.

d. Have original obligee discharge obligor from obligor's obligation to original obligee.

e. Have all parties agree that novation agreement supersedes original agreement and that all rights under it are extinguished.

Legal Topics:

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

Contracts LawPerformanceNovation



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DIVISION V: CONTRACTS AND OBLIGATIONS

CHAPTER 77 DISCHARGE OF OBLIGATIONS

PART III. TRANSACTION GUIDE

C. Procedural Guide to Discharge of Obligations

27-77 California Legal Forms--Transaction Guide § 77.145

§ 77.145 Modification

1. If existing agreement is in writing, have parties either:
 - a. Mutually agree to modify that contract [see § 77.320[2]], either to:
 - (1) Change some of original contract terms; or
 - (2) Add new terms.
 - b. Mutually agree to modification under terms of existing contract for modification on occurrence of specified events and pursuant to designated procedure [see § 77.321[2]].
2. If original contract permits modification of original terms on occurrence of specified conditions or events, have modifying party send notice of modification to other party [see § 77.322[2]].
3. If existing agreement is oral, have parties execute written agreement modifying it [see § 77.323[2]].

NOTE:

Written modification of an oral agreement does not require any consideration and extinguishes the oral agreement to the extent of the modification [*Civ. Code § 1697*].

4. If modifications desired by parties are extensive, consider redrafting original contract and extinguishing original contract by:
 - a. Mutual rescission [see § 77.330[2]]; or
 - b. Cancellation [see § 77.370[2]].

Legal Topics:

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

Contracts LawContract ModificationsGeneral OverviewContracts LawTypes of ContractsGeneral OverviewContracts LawTypes of ContractsOral Agreements



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DIVISION V: CONTRACTS AND OBLIGATIONS

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C. Procedural Guide to Discharge of Obligations

27-77 California Legal Forms--Transaction Guide § 77.146

§ 77.146 Rescission

1. If both parties agree to rescission, have them execute rescission by mutual consent [*see* § 77.330[2]].
2. If client has grounds for unilateral rescission [*see* § 77.125], have client execute notice of rescission promptly after learning of reason for rescinding [*see* § 77.340], setting forth statement of grounds.

NOTE:

This chapter includes a basic notice of rescission [*see* § 77.340[2]] and a number of clauses stating the common grounds [*see* §§ 77.350-77.356] for the rescission. These clauses are indicated below.

a. If ground for rescission is mistake, insert clause stating one of following as ground for rescission [*see* § 77.350[2]; *see also Harris v. Rudin, Richman & Appel* (2002) 95 Cal. App. 4th 1332, 1338-1341, 116 Cal. Rptr. 2d 552 (reversing summary judgment for plaintiff because defendants raised triable issues of fact as to whether they were entitled to rescind settlement agreement based on mutual mistake of fact or law)]:

- (1) Mutual mistake;
- (2) Unilateral mistake of fact; or
- (3) Unilateral mistake of law.

b. If ground for rescission is duress, insert clause stating one of following as ground for rescission [*see* § 77.351[2]]:

- (1) Duress of person; or

(2) Duress of goods.

c. If ground for rescission is menace, insert clause stating menace as ground for rescission [see § 77.351[2]].

d. If ground for rescission is undue influence, insert clause stating one of following as evidence of undue influence [see § 77.352[2]]:

- (1) Inappropriate time;
- (2) Unusual place;
- (3) Emphasis on consequences of delay;
- (4) Use of multiple parties to persuade;
- (5) Absence of independent advisors; or
- (6) Confidential or fiduciary relationship.

e. If ground for rescission is fraud, insert clause stating one of following as ground for rescission [see § 77.353[2]]:

- (1) Misrepresentation of material fact;
- (2) Unwarranted assertion;
- (3) Suppression of fact;
- (4) Promise without intent to perform; or
- (5) Constructive fraud by fiduciary.

f. If ground for rescission is failure of consideration, insert clause stating one of following as ground for rescission [see § 77.354[2]]:

- (1) Failure of consideration through breach by other party;
- (2) Failure of consideration before rendition to promisor; or
- (3) Consideration rendered void.

g. If ground for rescission is illegality, insert clause stating one of following as ground for rescission [see § 77.354[2]]:

- (1) Contract contrary to express provision of law;
- (2) Contract contrary to policy of express law; or

(3) Contract contrary to good morals.

h. If ground for rescission is that contract is prejudicial to public interest, insert clause stating that ground [see § 77.356[2]].

3. Instruct rescinding party to promptly restore to original owner, or at least offer to restore, all consideration received under contract to date of rescission.

NOTE:

The required offer [*Civ. Code* § 1691(b)] may be conditioned on the return of any consideration given by the rescinding party. The offer to restore need not be made if the other party is unable, or positively refuses, to restore the rescinding party's consideration [*Civ. Code* § 1691(b)].

Legal Topics:

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

Commercial Law (UCC)Sales (Article 2)PerformanceGeneral OverviewContracts LawRemediesRescission & RedhibitionGeneral Overview



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C. Procedural Guide to Discharge of Obligations

27-77 California Legal Forms--Transaction Guide § 77.147

§ 77.147 Termination for Breach and Cancellation

1. If other party has materially breached contract [see § 77.126], terminate contract by having client send notice of termination [see § 77.360[2]].
2. If other party's conduct or declaration unequivocally shows that he or she absolutely will not perform his or her duties under contract (as distinguished from mere declaration of intent not to be bound), terminate contract by having client send notice of termination based on anticipatory breach [see § 77.361].
3. If other party has materially breached severable portion of contract, terminate that portion by having client send notice of termination of that portion [see § 77.362[2]].
4. If all parties to contract desire abrogation of unperformed portion of contract have them:

NOTE:

Abrogation of a contract by cancellation extinguishes it only with respect to the parties who consent to the act of cancellation [*Civ. Code* § 1699].

- a. Execute cancellation agreement [see § 77.370[2]] stating intent to cancel and terms and conditions, if any.
- b. If appropriate, physically destroy all signed copies of contract or, at least, obliterate signatures of parties.

NOTE:

If any performance has already been rendered under the contract, physical destruction is

likely to be inappropriate since the parties will want to retain some record of their performance for tax or business reasons.

Legal Topics:

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

Contracts LawBreachGeneral OverviewContracts LawPerformanceDischarges & Terminations



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27-77 California Legal Forms--Transaction Guide §§ 77.148-77.199

[Reserved]

§§ 77.148[Reserved]



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PART IV. FORMS

A. Performance

1. Simple Receipt for Performance

27-77 California Legal Forms--Transaction Guide § 77.200

§ 77.200 Receipt for Full Performance in Discharge of Single Obligation

[1] Comment

[a] Use of Form

The form in [2], *below*, is a receipt for performance of a contractual obligation. It establishes a record of completed performance in discharge of an obligation [see [c], *below*], including written acceptance of the performance. It should be presented by the obligor to the obligee at or immediately after the time performance is rendered. The obligee will then sign the receipt to indicate receipt and acceptance of the performance.

If the obligor wishes to memorialize the offer (tender) of performance as well as its receipt, a different form may be used [see § 77.210[2]]. For discussion of the circumstances in which use of an offer of performance may be desirable, and analysis of the legal requirements and effects of such an offer, see § 77.210[1].

For discussion of the rules governing performance of contracts for the sale of goods, and forms relevant to the performance of obligations under such contracts, see Ch. 52, *Sales of Goods Under the Uniform Commercial Code*.

[b] Discharge of More Than One Obligation to Same Obligee

If the obligor has more than one obligation to the same obligee, special rules determine how the tendered performance is to be applied [see *Civ. Code* § 1479]. In most cases involving payments when there is more than one obligation, the payment will be partial, rather than in full. For discussion of these rules and the effect of partial payment, and a form to use to specify the order of application, see § 77.211.

[c] Acceptance of Full Performance Discharges Obligation

Full performance of an obligation, by the party who has the duty to perform (the obligor) or any other person on the obligor's behalf and with the obligor's consent, extinguishes the obligation if it is accepted by the obligee [*Civ. Code* §

1473]. This form specifically states that the obligee accepts the full performance tendered by the obligor.

[d] Right to Require Proper Receipt

An obligor has a right to require a receipt for any money, instrument, or property delivered to the obligee in performance of the obligation [*Civ. Code* § 1499; *Code Civ. Proc.* § 2075]. The obligor may demand a proper signature on such a receipt as a condition of the payment or delivery [*Code Civ. Proc.* § 2075].

[e] Multiple Obligors or Obligees

Performance of an obligation by one of several persons who are jointly liable extinguishes the liability of all of them [*Civ. Code* § 1474]. A contract obligation in favor of several persons is extinguished by performance rendered to any of them [*Civ. Code* § 1475]. The manner of performance may be directed by the obligee or one of a number of joint obligees, and if performance is rendered in the manner directed, the obligation is extinguished even if that obligee does not receive its benefit [*Civ. Code* § 1476].

[2] FORM

Receipt for Full Performance in Discharge of Single Obligation

RECEIPT AND ACCEPTANCE OF PERFORMANCE

_____ [name of obligee] hereby acknowledges receipt of _____ [the sum of \$ _____ or, if performance consists of something other than payment of money, specify what constitutes performance] from _____ [name of obligor or other party tendering performance with obligor's consent]. _____ [name of obligee] agrees and acknowledges that the foregoing [payment or performance] constitutes full performance of the obligation of _____ [name of obligor] to _____ [name of obligee] under _____ [describe document underlying transaction, e.g., the contract dated _____ (date) for _____ (specify)] and shall fully discharge _____ [name of obligor] from any further obligation under that [specify, e.g., contract].

Executed _____ [date] at _____ [city], California.

_____ [signature of obligee]
 _____ [typed name]

Legal Topics:

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

Contracts Law Performance General Overview Contracts Law Performance Discharges & Terminations



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A. Performance

1. Simple Receipt for Performance

27-77 California Legal Forms--Transaction Guide §§ 77.202-77.209

[Reserved]

§§ 77.202[Reserved]



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PART IV. FORMS

A. Performance

2. Offer (Tender) of Performance

27-77 California Legal Forms--Transaction Guide § 77.210

§ 77.210 Offer of Performance, Acceptance, and Receipt--Accompanied by Actual Delivery

[1] Comment

[a] Use of Form

The form in [2], *below*, may be used to memorialize an offer (or tender) of performance, and the form provides also for the acceptance of that offer and receipt of the performance. It is intended to accompany an actual delivery of the performance being offered. If the offer of performance will not be accompanied by actual delivery at the time of offer [see *Civ. Code § 1496*; see also [c], *below*], the form in § 77.212[2] should be used.

Because this form contains a receipt for the performance, it may be used in any situation in which a simple receipt such as the form in § 77.200[2] would be appropriate. (For discussion of the obligor's right to require a receipt for performance, see § 77.200[1][d].) However, this form has the additional advantage of memorializing the fact that performance has been offered and accepted. This may be desirable if there is a likelihood that the tender may be refused.

This form is drafted as an offer by the obligor, but it may be made by another person authorized by and acting on behalf of the obligor [*Civ. Code § 1487*]. It must be made to the obligee (or any joint obligee) or an authorized agent [*Civ. Code § 1488*].

For discussion of the rules governing performance and tender of performance under contracts for the sale of goods, and forms relevant to the performance of obligations under such contracts, see Ch. 52, *Sales of Goods Under the Uniform Commercial Code*.

[b] Basic Requirements for Valid Offer of Performance

An offer of performance must be made in good faith [*Civ. Code § 1493*]. The person making the offer must be able and willing to perform according to the terms of the offer [*Civ. Code § 1495*].

Ordinarily, the offer also must be unconditional [*Civ. Code § 1494*]. However, if the obligor is entitled to the performance of a condition precedent or concurrent in connection with the offered performance of the obligation, the offer may be made contingent on the performance of that condition [*Civ. Code § 1496*].

[c] When and How Offer Must Be Made

Generally, if the obligation is subject to a specified time for performance, the offer of performance must be made at that time and within reasonable hours [*Civ. Code § 1490*]. If no time has been fixed, the obligor may offer performance at any time before refusing to perform in response to a reasonable demand from the obligee [*Civ. Code § 1491*].

An offer of performance, if accompanied by an offer of compensation for a delay, may be made at any time after the due date, as long as the delay is capable of exact and full compensation and the contract does not contain a time-of-the-essence provision. Any such offer is without prejudice to any rights acquired by the obligee or any other party in the meantime [*Civ. Code § 1492*]. For a late offer of performance, see § 77.213.

[d] Obligation for Payment of Money

If the obligation is for the payment of money, it may be extinguished by a due offer of payment, provided the amount is immediately deposited in the name of the creditor with a reputable bank or savings and loan association in California, and the creditor is notified of the deposit [*Civ. Code § 1500*].

[e] Delivery and Title

Delivery is not necessarily required prior to acceptance of the offer of performance [*Civ. Code § 1496*; *Code Civ. Proc. § 2074*]. For additional discussion, and a form that may be used when the offer of performance is not accompanied by delivery, see § 77.212.

If a particular thing is offered in performance of the obligation, title to it will pass to the obligee only if the obligor's intention to that effect is stated at the time [*Civ. Code § 1502*].

[f] Running of Interest and Other Incidents of Obligation

A duly made offer of payment or other performance stops the running of interest on the obligation, and all other incidents of the obligation. This is so even if the title to the property offered is not transferred to the obligee [*Civ. Code § 1504*; see *Walker v. Houston* (1932) 215 Cal. 742, 745-746, 12 P.2d 952 (distinguishing between "incidents" of obligation and obligation itself)].

[g] Refusal of Valid Offer

An obligation can be extinguished by an offer of full performance made with intent on the part of the obligor to extinguish the obligation [*Civ. Code §§ 1485, 1486*]. Failure to accept a valid tender will render the obligee in default under the contract [*Still v. Plaza Marina Commercial Corp.* (1971) 21 Cal. App. 3d 378, 385, 98 Cal. Rptr. 414] and will permit the obligor to exercise the available remedies for breach of contract [*Walker v. Houston* (1932) 215 Cal. 742, 745, 12 P.2d 952 ; see § 77.13; see also § 77.212[1] (effect of refusal of offer when unaccompanied by physical delivery)].

[h] Waiver of Defects in Performance

The acceptance of performance contained in this form may be useful if it later becomes necessary to prove that the obligee did not object to the offer at the time it was made. All objections to the mode of an offer of performance that the

obligee has an opportunity to state at the time to the obligor, and that could then be obviated by the obligor, are deemed waived by the obligee if not stated at that time [*Civ. Code* § 1501]. If the objection is to the amount of money, the terms of the instrument, or the amount or kind of property, the obligee must specify the amount, terms, or kind that would be required to meet the objection, or be precluded from objecting afterward [*Code Civ. Proc.* § 2076].

[2] FORM

Offer of Performance, Acceptance, and Receipt--Accompanied by Actual Delivery

OFFER OF PERFORMANCE

To: _____ [*name of obligee*]
 _____ [*business address*]

1. Identification of Obligation. I am obligated to _____ [*describe performance due, e.g., pay you the*
 sum of \$ _____] on _____ [*date*] pursuant to _____ [*describe*
document underlying the transaction, e.g., our contract dated _____ (*date*) *for* _____
 (*specify*)].

2. Tender of Performance. I hereby tender _____ [*describe performance, e.g., payment of the sum of*
 \$ _____] in full performance of the obligation described above.

3. Execution of Acceptance and Receipt. The above [payment or performance] is conditioned on the requirement that you sign and date the accompanying acceptance and receipt in the space provided below to indicate acceptance of the tendered [payment or performance] as full performance of the obligation described above, and that you return one original signed copy to the address indicated above.

Executed _____ [*date*] at _____ [*city*], California.

_____ [*signature of obligor*]
 _____ [*typed name*]

ACCEPTANCE AND RECEIPT

_____ [*name of obligee*] hereby accepts the tender of performance on the terms and conditions stated above, and acknowledges that it shall constitute full and complete performance of the obligation of _____ [*name of obligor*] under the contract referred to above and shall fully discharge _____ [*name of obligor*] from any further obligation under that contract. _____ [*name of obligee*] further acknowledges receipt of _____ [the sum of \$ _____ or, if performance consists of something other than payment of money, specify what constitutes performance] from _____ [*name of obligor or other party tendering performance with obligor's consent*] at the time of execution of this receipt.

Executed _____ [*date*] at _____ [*city*], California.

_____ [*signature of obligee*]
 _____ [*typed name*]

Legal Topics:

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

Contracts Law Formation Acceptance General Overview Contracts Law Performance General Overview Contracts Law Performance Tender & Delivery Contracts Law Sales of Goods Form, Formation & Readjustment Formation Offer & Acceptance



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DIVISION V: CONTRACTS AND OBLIGATIONS

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PART IV. FORMS

A. Performance

2. Offer (Tender) of Performance

27-77 California Legal Forms--Transaction Guide § 77.211

§ 77.211 Offer of Performance, Acceptance, and Receipt--Discharge of Multiple Obligations

[1] Comment

[a] Use of Form

The form in [2], *below*, is an offer (tender) of performance that is intended to be applied to multiple obligations to pay money. Like the *form in § 77.210[2]*, it is intended to accompany actual delivery of the performance being offered and includes an acceptance of and receipt for the performance. For illustrative purposes, it is drafted for use when part of the performance is to be applied in full discharge of one of the multiple obligations and partial performance of another obligation. However, it can be modified to omit the direction for application in full discharge of a specified obligation, in which case the statutory rules of allocation [*Civ. Code § 1479*] will apply [*see [c], below*].

[b] Effect of Partial Performance

Partial performance of an indivisible obligation will extinguish the corresponding proportion of the obligation if the obligee voluntarily retains the benefit of that partial performance. However, if it is of such a nature that the obligee cannot avoid retaining it without injuring his or her own property, retention is not presumed to be voluntary [*Civ. Code § 1477*].

[c] Application of Performance--Several Obligations

If the obligor has several obligations to an obligee and tenders performance that is equally applicable to two or more of those obligations, the performance must be applied in accordance with the following statutory rules [*Civ. Code § 1479*].

- If, at the time of performance, the obligor manifests to the obligee an intention or desire that the performance be applied to extinguish a particular obligation, the obligee must apply it in that manner.
- If there is no such expression of intent, the obligee may apply it to extinguish any obligation due to

the obligee as an individual at the time.

■ If neither party makes an allocation within a reasonable time, it must be applied to extinguish items in this order: first, any interest due; next, the principal due; next, the obligation with the earliest maturity; next, unsecured obligations; finally, secured obligations. If there are two or more obligations in any class, the performance must be applied proportionally to all of the obligations in that class.

[2] FORM

Offer of Performance, Acceptance, and Receipt--Discharge of Multiple Obligations

OFFER OF PERFORMANCE

To: _____ [*name of obligee*]
 _____ [*business address*]

1. Identification of Obligations. I am currently obligated to pay you the following sums pursuant to the following contracts: [*specify*].

2. Tender of Performance. I hereby tender payment of the sum of \$_____, to be applied as specified in Paragraph 3, below.

3. Allocation. This payment shall be applied by you to the obligations enumerated in Paragraph 1 as follows:

(a) \$_____ shall be applied in full performance of the obligation under the first contract described in Paragraph 1. Thereupon, I shall be fully discharged from any further obligation under that contract.

(b) The balance of the payment described in Paragraph 2, amounting to \$_____, shall be applied in partial performance of the obligation under the second contract described in Paragraph 1.

4. Demand for Receipt. The payment described in Paragraph 2 is tendered on condition that you indicate acceptance and receipt, and application of that payment in the manner specified in Paragraph 3, by executing the acceptance and receipt set forth below, and that return one original signed copy to the address indicated above.

Executed _____ [*date*] at _____ [*city*], California.

_____ [*signature of obligor*]
 _____ [*typed name*]

ACCEPTANCE AND RECEIPT

_____ [*name of obligee*] hereby acknowledges receipt of the sum of \$_____ from _____ [*name of obligor or other party tendering performance with obligor's consent*].
 _____ [*name of obligee*] agrees to apply that payment in the manner described in Paragraph 3, above, and further acknowledges that this payment shall constitute full performance of the obligation of _____ [*name of obligor*] to _____ [*name of obligee*] pursuant to the first contract described in Paragraph 1, above, and that it shall fully discharge _____ [*name of obligor*] from any further obligation under that contract; and that the balance of that payment shall be applied in partial performance of the obligation of _____ [*name of obligor*] to _____ [*name of obligee*] pursuant to the

second contract described in Paragraph 1, above.

Executed _____[*date*] at _____[*city*], California.

_____[*signature of obligee*]

_____[*typed name*]

Legal Topics:

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

Contracts LawNegotiable InstrumentsDischarge & PaymentDischargeContracts LawPerformanceGeneral
OverviewContracts LawPerformanceTender & Delivery



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PART IV. FORMS

A. Performance

2. Offer (Tender) of Performance

27-77 California Legal Forms--Transaction Guide § 77.212

§ 77.212 Offer of Performance and Acceptance--Not Accompanied by Actual Delivery

[1] Comment

[a] Use of Form

The form in [2], *below*, is a written offer (tender) of performance that is not accompanied by actual delivery of the performance being offered. It may be used, when appropriate, in lieu of actual production of the specific thing to be delivered. An offer such as this is typically used, for example, when the underlying obligation was entered into considerably in advance of the anticipated time of actual performance, and the obligor wants to confirm that it will be made in the manner provided in the contract, or when performance is conditioned on the occurrence of some other act or event (such as the availability of a particular commodity or product). However, there is no legal bar to the use of such a form in other situations.

For discussion of the rules governing performance of contracts for the sale of goods, and forms relevant to the performance of obligations under such contracts, see Ch. 52, *Sales of Goods Under the Uniform Commercial Code* .

[b] Legal Advantages

A written offer to pay a particular sum of money, or to deliver a written instrument or specific personal property, if not accepted, is equivalent to the actual production and tender of the money, instrument, or property [*Code Civ. Proc.* § 2074]. The thing to be delivered, if any, need not actually be produced at the time performance is offered unless the offer is accepted [*Civ. Code* § 1496; see *State of California v. Agostini* (1956) 139 Cal. App. 2d 909, 913-914, 294 P.2d 769] . Thus, this form, when properly used, will have the same effect as an actual attempt to deliver performance if the offer is refused, provided all other requirements for a valid offer of performance are met [see § 77.210[1]]. In other words, it will place the obligee in default if the obligee refuses to accept the offer [*Still v. Plaza Marina Commercial Corp.* (1971) 21 Cal. App. 3d 378, 385, 98 Cal. Rptr. 414] and will give the obligor the right to exercise available remedies for breach of contract [*Walker v. Houston* (1932) 215 Cal. 742, 745, 12 P.2d 952] .

[c] Acceptance

Requiring the obligee to sign to indicate acceptance may be useful as a method of documenting acceptance of the offer. In addition, it may later serve as proof that the obligee waived objections to the offered performance by not raising them at the time the offer was made [see *Civ. Code* § 1501; *Code Civ. Proc.* § 2076; see also § 77.210[h]].

[d] Separate Receipt

Since the offer is not accompanied by actual performance, this form does not include a receipt. A separate receipt, such as the form in § 77.200[2], may be required after performance is rendered [see § 77.200[1][d]].

[2] FORM**Offer of Performance and Acceptance--Not Accompanied by Actual Delivery****OFFER OF PERFORMANCE**

To: _____ [name of obligee]
 _____ [business address]

1. Identification of Obligation. Under the terms of our contract dated _____ [date], I am obligated to _____ [state nature of performance, e.g., install one Acme model 2345-Z greenhouse on your property located at 1400 Main Street, San Rafael, California, or pay you the sum of \$ _____] on or before _____ [date].

[EITHER, to offer delivery of goods:]

2. Offer of Performance. Accordingly, I hereby offer to _____ [describe offered performance, e.g., install one Acme model 2345-Z greenhouse for the agreed-on price of \$ _____], on _____ [date], at [place]. _____ [Add, if appropriate: Title to the property offered _____ (shall or shall not) pass to you immediately on acceptance of this offer. Until you accept the property offered, I will hold it as a depositary for hire on your behalf.]

[OR, to offer payment of money:]

2. Offer of Performance. Accordingly, I hereby offer to pay you the sum of \$[specify full amount due]. On your acceptance, I shall immediately deposit that sum in your name with _____ [name of reputable bank or savings and loan association in California] in full performance of the contract obligation referred to in Paragraph 1, above.

_____ [signature of obligor]
 _____ [typed name]

ACCEPTANCE

_____ [name of obligee] hereby accepts the terms of the above offer of performance and acknowledges that performance, when rendered as described above, shall constitute full and complete performance of

the obligation of _____ [*name of obligor*] under the contract referred to above.

Executed _____ [*date*] at _____ [*city*], California.

_____ [*signature of obligee*]

_____ [*typed name*]

Legal Topics:

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

Contracts LawFormationGeneral OverviewContracts LawFormationAcceptanceGeneral OverviewContracts
LawFormationOffersGeneral Overview



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PART IV. FORMS

A. Performance

2. Offer (Tender) of Performance

27-77 California Legal Forms--Transaction Guide § 77.213

§ 77.213 Offer of Performance and Acceptance--Late Offer After Maturity of Obligation

[1] Comment

[a] Use of Form

The form in [2], *below*, is a late offer (tender) of full performance of an obligation to pay money, together with compensation for the delay. It is intended for use when the obligor has failed to perform an obligation by the date specified in the original agreement, and the agreement does not expressly state that time is of the essence [*Civ. Code* § 1492; *see [b], below*]. Like the *form in* § 77.212[2], this form assumes that the offer of performance will not be accompanied by an actual delivery of the payment. Its advantage, when used in this manner, is that it stops the running of interest on the obligation and has the same effect as performance on all the incidents of the obligation [*see Civ. Code* § 1504; *see Walker v. Houston* (1932) 215 Cal. 742, 745-746, 12 P.2d 952 (distinguishing between "incidents" of obligation and obligation itself)].

For discussion of the effect of tender of performance generally, *see* § 77.210[1]. For discussion of the effect of an offer of performance unaccompanied by actual delivery of the performance being offered, *see* § 77.212[1].

For discussion of the rules governing performance of contracts for the sale of goods, and forms relevant to the performance of obligations under such contracts, *see* Ch. 52, *Sales of Goods Under the Uniform Commercial Code* .

[b] Offer Made After Obligation Is Due

When a time is fixed for performance, generally the offer of performance must be made at that time [*Civ. Code* § 1490]. However, an offer of performance, if accompanied by an offer of compensation for a delay, may be made at any time after the due date. The delay must be capable of exact and full compensation, and the contract must not contain a time-of-the-essence provision. Any such offer is without prejudice to any rights acquired by the obligee or any other party in the meantime [*Civ. Code* § 1492].

[2] FORM**Offer of Performance and Acceptance--Late Offer After Maturity of Obligation****OFFER OF PERFORMANCE**

To: _____ [name of obligee]
 _____ [business address]

1. Identification of Obligation. I am currently obligated to _____ [describe performance due, e.g., pay you the sum of \$ _____] on _____ [date], pursuant to _____ [describe document underlying the transaction, e.g., our contract dated _____ (date) for _____ (specify)].

2. Offer of Performance. Accordingly, I hereby offer to pay you the sum of \$[specify full amount due plus interest], which includes interest on the original obligation at the rate of _____ percent as compensation for my failure to make timely payment. On your acceptance, I shall immediately deposit that sum in your name with _____ [name of reputable bank or savings and loan association in California] in full performance of the contract obligation referred to in Paragraph 1, above.

Executed _____ [date] at _____ [city], California.

 _____ [signature of obligor]
 _____ [typed name]

ACCEPTANCE

_____ [name of obligee] hereby accepts the terms of the above offer of performance as stated in this letter and acknowledges that performance, when rendered as described above, shall constitute full and complete performance of the obligation of _____ [name of obligor] under the contract referred to above.

Executed _____ [date] at _____ [city], California.

 _____ [signature of obligee]
 _____ [typed name]

Legal Topics:

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

Contracts LawFormationAcceptanceGeneral OverviewContracts LawFormationAcceptanceMethods of AcceptanceOvert ActsContracts LawFormationOffersGeneral OverviewContracts LawPerformanceGeneral Overview



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DIVISION V: CONTRACTS AND OBLIGATIONS

CHAPTER 77 DISCHARGE OF OBLIGATIONS

PART IV. FORMS

A. Performance

2. Offer (Tender) of Performance

27-77 California Legal Forms--Transaction Guide §§ 77.214-77.219

[Reserved]

§§ 77.214[Reserved]



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DIVISION V: CONTRACTS AND OBLIGATIONS

CHAPTER 77 DISCHARGE OF OBLIGATIONS

PART IV. FORMS

B. Accord and Satisfaction

1. Agreements

27-77 California Legal Forms--Transaction Guide § 77.220

§ 77.220 Accord Agreement and Receipt for Performance in Satisfaction

[1] Comment

[a] Use of Form

The form in [2], *below*, is a two-part document that includes all of the elements needed to establish a completed accord and satisfaction to extinguish a preexisting claim for a different or greater obligation. The first part is the accord (or agreement) [*see Civ. Code § 1521*]. The second part is the obligee's acceptance of and receipt for the obligor's performance of the accord agreement, and this part constitutes the satisfaction [*see Civ. Code § 1523*].

The accord begins with a description of the disputed obligation and includes a statement describing the dispute between the parties, the settlement of which will constitute consideration for the accord and the obligee's agreement to accept something different from or less than the originally promised performance. This form also states that settlement of the dispute constitutes consideration for the accord, although such a statement is not necessary for a valid accord and satisfaction.

The second part of an accord and satisfaction is an acknowledgment that the obligee has received and accepted the performance agreed-on in the accord. Since it constitutes evidence that the obligee has accepted the agreed-on performance, it operates as the satisfaction. Taken together, these elements constitute a completed accord and satisfaction.

[b] Accord and Satisfaction

An "accord" is an agreement by an obligee to accept, in extinction of the obligation (that is, a legal duty that binds a person to do or not to do a particular thing [*see Civ. Code § 1427*]), something different from or less than that to which the obligee is entitled [*Civ. Code § 1521*]. "Satisfaction" is acceptance by the obligee of the consideration specified in the accord. It is satisfaction that extinguishes the original obligation [*Civ. Code § 1523*].

An accord, by itself, does not extinguish the original obligation until it is fully executed, even though it does bind the parties to its terms [Civ. Code § 1522]. Actual tender of performance under the accord, without acceptance of that performance, does not constitute an accord and satisfaction and will not support the defense that there has been an accord and satisfaction that extinguishes the original contract obligation. Acceptance of the tendered agreed-on performance is satisfaction [Civ. Code § 1523; see *Silvers v. Grossman* (1920) 183 Cal. 696, 699, 192 P. 534] .

[c] Elements of Accord and Satisfaction

An accord is an agreement [Civ. Code § 1521]. Thus, the primary principles that govern contracts are applicable [*Moving Picture etc. Union v. Glasgow Theaters, Inc.* (1970) 6 Cal. App. 3d 395, 403, 86 Cal. Rptr. 33] , namely, competent parties, their consent (a meeting of the minds), a lawful object (proper subject matter), and consideration [Civ. Code § 1550; *Republic Indem. Co. v. Maier Brewing Co.* (1967) 249 Cal. App. 2d 495, 499, 57 Cal. Rptr. 670 ; see § 77.16[6]].

[d] Obligor's Right to Receipt for Performance Tendered

An obligor has a right to require a written receipt for any property delivered to the obligee in performance of the obligation [Civ. Code § 1499].

[2] FORM

Accord Agreement and Receipt for Performance in Satisfaction

ACCORD AGREEMENT

_____[name of obligor], _____[address], hereinafter referred to as Obligor, and
 _____[name of obligee], _____[address], hereinafter referred to as Obligee or
 Creditor, in consideration of the mutual promises made herein, agree as follows.

1. Disputed Obligation. Obligee claims that Obligor is obligated to _____[describe performance due, e.g., pay Obligee the sum of \$ _____] pursuant to _____[describe document underlying the transaction, e.g., a contract dated _____ (date), a copy of which is attached as an exhibit].

2. Existence of Dispute. The parties acknowledge that there is a dispute between them with respect to the performance of their obligations described in Paragraph 1. Specifically, [describe dispute].

3. Accord. Obligor hereby tenders to Obligor, and Obligee hereby accepts, in extinction of the obligation described above, [describe something different from or less than original obligation, e.g., the sum of \$ _____], to be paid as follows: _____ (describe different payment schedule)]. The parties acknowledge that Obligor's [payment or performance] is [less than or different from] that which Obligor was originally obligated to render to Obligee. After the stated performance has been rendered by Obligor and accepted by Obligee, all obligations of either party described in Paragraph 1 shall be deemed extinguished.

4. Settlement as Consideration. The parties acknowledge and agree that the agreement set forth in Paragraph 3, above, constitutes a settlement of the dispute described in Paragraph 2, above, and that settlement of that dispute constitutes the consideration for this agreement.

Executed _____[date] at _____[city], California.

OBLIGOR



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B. Accord and Satisfaction

1. Agreements

27-77 California Legal Forms--Transaction Guide § 77.221

§ 77.221 Offer of Accord, Acceptance, and Receipt of Consideration in Satisfaction

[1] Comment--Use of Form

The form in [2], below, is an accord and satisfaction agreement in letter form. A letter is useful when the parties are distant from each other or are unable for any other reason to meet face to face in connection with negotiation, execution, and performance of the accord. This form contains all of the essential elements of an accord and satisfaction: an offer of accord by the obligor, a space for the obligee to indicate acceptance of the terms of the accord, and an acceptance of the performance due under the accord in satisfaction of the obligation [*see Civ. Code § 1521 et seq.*].

This form is drafted on the assumption that the performance offered by the obligor will take the form of a money payment, but if the performance will consist of something other than the payment of money, the form can be modified accordingly. The obligor has a statutory right to require a written receipt [*Civ. Code § 1499*]. The offered check should have accord and satisfaction language endorsed on its reverse [*see § 77.230[2]*].

For additional discussion of the elements of an accord and satisfaction, and other relevant discussion, see § 77.220[1].

[2] FORM

Offer of Accord, Acceptance, and Receipt of Consideration in Satisfaction

In settlement of my original obligation under the [*specify, e.g., contract*] made _____ [*date*], under which I was to pay you the sum of \$_____ for [*describe obligee's reciprocal obligation in general terms, e.g., the application of foam insulation to the roof of my residence located in San Rafael, California*], I offer to pay you the sum of \$_____, with that payment to constitute full satisfaction of my obligation.

[*EITHER, if payment will accompany offer of accord:*]

Enclosed is a check for \$_____ payable to you pursuant to the terms of my offer as stated above. If the offer is acceptable, indicate your acceptance by signing the acceptance and receipt immediately below my signature, and return the original to me in the enclosed stamped self-addressed envelope. If my offer is not acceptable, return the check in that envelope.

[OR, if payment will not accompany offer of accord:]

If my offer is acceptable, please sign the acceptance immediately below my signature and return this letter to me in the enclosed stamped self-addressed envelope. On receipt of your acceptance, I will immediately transmit my check for \$_____, payable to you in full satisfaction of my existing obligation to you, pursuant to the terms of my offer as stated above.

_____ [signature of obligor]
 _____ [typed name]

ACCEPTANCE [AND RECEIPT]

I hereby accept your offer as set forth above [add, if payment accompanies offer: and acknowledge receipt in full of the sum specified in your offer]. I agree that this sum shall constitute full satisfaction of the original obligation and that the original obligation _____ [has now been extinguished or will be extinguished on my receipt of payment as set forth above].

Executed _____ [date] at _____ [city], California.

_____ [signature of obligor]
 _____ [typed name]

Legal Topics:

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

Contracts Law Formation General Overview Contracts Law Formation Acceptance General Overview Contracts Law Performance Accord & Satisfaction



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PART IV. FORMS

B. Accord and Satisfaction

1. Agreements

27-77 California Legal Forms--Transaction Guide § 77.222

§ 77.222 Accord and Satisfaction--Undisputed Obligation--Partial Performance Without New Consideration

[1] Comment

[a] Use of Form

The forms in [2], *below*, are alternative forms for an accord and satisfaction for use when there is no dispute between the parties with respect to the obligation due to the obligee, and the obligee has agreed to receive partial performance in complete satisfaction of the obligation. The first alternative, in [2][a], *below*, is a simple expression of acceptance by the obligee of the lesser performance in satisfaction of the obligation. The second, in [2][b], *below*, is a more elaborate accord and satisfaction agreement. Either alternative can be used to extinguish the obligation, even though there is no new consideration [*Civ. Code § 1524*].

[b] Agreement for Partial Performance Without New Consideration

The common law rule applicable to accord and satisfaction was that in the absence of a dispute with regard to the amount due, payment of a lesser amount in satisfaction of the claim was not sufficient consideration to support such an agreement [*Schwartz v. Cal. Claim Service (1942) 52 Cal. App. 2d 47, 52-53, 125 P.2d 883*] . However, in California, part performance of an undisputed obligation, either before or after its breach, will extinguish that obligation when expressly accepted in satisfaction by the obligee in writing or when rendered pursuant to a written agreement, even though there is no new consideration [*Civ. Code § 1524*; *Petroleum Collections, Inc. v. Sulser (1968) 265 Cal. App. 2d Supp. 976, 977-979, 70 Cal. Rptr. 537*] .

[2] FORMS

[a] Acceptance of Partial Performance

Acceptance of Partial Performance

_____ [name of obligee] hereby accepts _____ [describe lesser performance, e.g., payment of the sum of \$ _____] in full and complete satisfaction of the obligation of _____ [name of obligor] to _____ [describe original obligation, e.g., pay the sum of \$ _____] under a contract dated _____ (date)].

Executed _____ [date] at _____ [city], California.

_____ [signature of obligee]
 _____ [typed name]

[b] Agreement and Receipt

Accord and Satisfaction

ACCORD AND SATISFACTION

_____ [name of obligor], _____ [address], hereinafter referred to as Obligor, and
 _____ [name of obligee], _____ [address], hereinafter referred to as Obligee or
 Creditor, in consideration of the mutual promises made herein, agree as follows.

1. Current Obligation. Obligor is currently obligated to _____ [describe performance due, e.g., pay Obligee the sum of \$ _____] pursuant to _____ [describe document underlying the transaction, e.g., a contract dated _____ (date) for _____ (specify)].

2. Agreement for Partial Performance. Obligor hereby agrees to [pay or give] Obligee, and Obligee hereby agrees to accept, in extinction of the obligation described above, _____ [describe part performance of original obligation, e.g., the sum of \$ _____].

Executed _____ [date] at _____ [city], California.

OBLIGOR

_____ [signature of obligor]
 _____ [typed name]

OBLIGEE

_____ [signature of obligee]
 _____ [typed name]

RECEIPT

Obligee hereby acknowledges receipt in full of the performance described in Paragraph 2, above, and accepts that performance in full satisfaction and extinction of the obligation described in Paragraph 1, above.

Executed _____ [date] at _____ [city], California.

_____ [signature of obligee]
 _____ [typed name]

Legal Topics:

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

Contracts LawConsiderationGeneral OverviewContracts LawPerformanceAccord & SatisfactionContracts
LawPerformancePartial PerformanceGeneral Overview



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B. Accord and Satisfaction

1. Agreements

27-77 California Legal Forms--Transaction Guide §§ 77.223-77.229

[Reserved]

§§ 77.223[Reserved]



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B. Accord and Satisfaction

2. Check Endorsements

27-77 California Legal Forms--Transaction Guide § 77.230

§ 77.230 Accord and Satisfaction Endorsement

[1] Comment

[a] Use of Form

The form in [2], *below*, illustrates two alternatives for the satisfaction of an obligation by endorsement on a check or draft. The first is an accord and satisfaction to be used when the amount of the obligation is disputed or unliquidated. The second is a satisfaction by part performance on the obligee's written agreement [*see Civ. Code § 1524*]. This alternative, unlike the first, may be used even when the amount of the claim is undisputed [*see [b], below*]. If one of these alternatives is used, it may be placed either on the face or the reverse of the check or draft. To reduce the possibility of inadvertent acceptance [*see Civ. Code § 1526(a); see also [c][i], below*], however, it is recommended that the language be placed on the reverse of the check or draft if possible.

[b] Partial Performance as Satisfaction--Requirement of Bona Fide Dispute

An accord and satisfaction, like any other contract, requires consideration [*see § 77.16[6][e]*]. The common law rule was that in the absence of a dispute as to the amount due, payment of a lesser amount in satisfaction of a claim lacked sufficient consideration to support an accord and satisfaction [*Schwartz v. Cal. Claim Service* (1942) 52 Cal. App. 2d 47, 52-53, 125 P.2d 883] . However, in California, part performance of an obligation extinguishes that obligation when accepted in writing by the obligee, even though there is no new consideration [*Civ. Code § 1524*]. This means that a creditor's endorsement of a statement on a check that it is accepted as a complete discharge of a debt does satisfy that debt [*Petroleum Collections, Inc. v. Sulser* (1968) 265 Cal. App. 2d Supp. 976, 977, 70 Cal. Rptr. 537 ; *see Schwartz v. Cal. Claim Service* (1942) 52 Cal. App. 2d 47, 52-53, 125 P.2d 883 ; *see also § 77.16[6][g]*].

[c] Protest by Obligee; Inadvertent or Unknowing Acceptance

Although the acceptance of a check or draft tendered in full discharge of a disputed or unliquidated claim ordinarily constitutes an accord and satisfaction [*Potter v. Pacific Coast Lumber Co.* (1951) 37 Cal. 2d 592, 597, 234 P.2d 16]

and extinguishes the obligation [*Civ. Code § 1523*], the obligee may avoid satisfaction of the claim by protest. The obligee may protest against accepting the tender in full payment by striking out or otherwise deleting the notation on the instrument to the effect that the check or draft is offered in full discharge of the claim. An inadvertent acceptance of such a check or draft or an acceptance without knowledge of the notation also is not an accord and satisfaction [*Civ. Code § 1526(a)*].

[d] Composition or Extension Agreement; Knowledge of Restriction

Regardless of any protest [*see [c], above*], the acceptance of a check or draft tendered pursuant to a composition or extension agreement [*see Ch. 78, Creditors' Agreements: Nonbankruptcy Alternatives*] between a debtor and creditors is an accord and satisfaction if two conditions are satisfied. First, all creditors of the same class must be accorded similar treatment under the composition or extension agreement. Second, the creditor must receive the check or draft with knowledge of the restriction [*Civ. Code § 1526(b)*]. A creditor will be conclusively presumed to know of a restriction if either of the following applies.

- The creditor executed a written consent to the composition or extension agreement before receiving the check or draft [*Civ. Code § 1526(b)(1)*].
- The creditor was given written notice, at least 15 days and no more than 90 days before receiving the check or draft, that the check or draft would be tendered with a restrictive endorsement and that accepting and cashing the check or draft would constitute an accord and satisfaction [*Civ. Code § 1526(b)(2)*]. Mailing the notice by first-class mail, postage prepaid, addressed to the address shown for the creditor on the debtor's books, or to an address designated in writing by the creditor, constitutes notice [*Civ. Code § 1526(d)*].

[e] Check Issued in Conjunction With Release of Claim

Notwithstanding the provisions of *Civ. Code § 1526(a)* [*see [c], above*], an obligee's acceptance of a check or draft is an accord and satisfaction if the check or draft was issued pursuant to or in conjunction with the release of a claim [*Civ. Code § 1526(c)*]. For discussion of releases, see § 77.18.

[f] Ability of Payee to Protest Under Commercial Code

The Commercial Code provides that a party that accepts a performance with an explicit reservation of rights by such words as "without prejudice" or "under protest" or the like does not thereby prejudice the rights so reserved [*Com. Code § 1308(a)*]. The explicit reservation of rights, however, does not apply to an accord and satisfaction [*Com. Code § 1308(b)*]. Before adoption of *Civ. Code § 1526*, which allows an obligee to accept a check and yet avoid accord and satisfaction by striking out accord and satisfaction language on the check [*see [c], above*], it was held that former *Com. Code § 1207*, the predecessor section to current *Com. Code § 1308*, which at that time did not state that it was inapplicable to an accord and satisfaction, was completely inconsistent with and did not supersede the law of accord and satisfaction [*see Connecticut Printers, Inc. v. Gus Kroesen, Inc. (1982) 134 Cal. App. 3d 54, 60, 184 Cal. Rptr. 436*]. Under that holding, if an obligor endorsed a check with clear and unequivocal language stating that the check must be accepted in full discharge of the obligee's claim or not at all, and the obligee accepted and cashed the check but added words of protest, the words of protest would not defeat an accord and satisfaction [*see Connecticut Printers, Inc. v. Gus Kroesen, Inc. (1982) 134 Cal. App. 3d 54, 59, 184 Cal. Rptr. 436*]. While the 1992 amendment to former *Com. Code § 1207* (now *see Com. Code § 1308*, amended without substantive change) made clear that a reservation of rights does not apply to an accord and satisfaction [*see former Com. Code § 1207(b) (now see Com. Code § 1308(b))*], it is recommended that the safest course for a payee who wishes to reserve rights under the Commercial Code would be to cross out the notation on the check or draft [*see Civ. Code § 1526*] and add words of protest [*see Com. Code § 1308*].

[2] FORM

Accord and Satisfaction Endorsement

[EITHER, for accord and satisfaction:]

This payment is in full settlement of _____ *[describe obligation or document underlying obligation]*. If not correct or acceptable, return to drawer. Endorsement by payee will constitute satisfaction in full of the foregoing obligation.

[OR, for satisfaction by part payment:]

Payee hereby expressly accepts this payment in full and complete satisfaction of drawer's obligation to pay the sum of \$_____ pursuant to _____ *[describe obligation or document underlying obligation]*.

Legal Topics:

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

Contracts LawPerformanceGeneral OverviewContracts LawPerformanceAccord & Satisfaction



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B. Accord and Satisfaction

2. Check Endorsements

27-77 California Legal Forms--Transaction Guide §§ 77.231-77.239

[Reserved]

§§ 77.231[Reserved]



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C. Settlement

1. Release of Existing or Pending Claim

27-77 California Legal Forms--Transaction Guide § 77.240

§ 77.240 General Release--Existing Known and Unknown Claims--Single Adverse Party

[1] Comment

[a] Use of Form

The form in [2], *below*, is a general release of all existing claims, whether known or unknown, that an individual obligee might have against an individual obligor. (If unknown claims will not be released, then the paragraphs covering unknown claims should be omitted.) It is intended for use by a party who desires to relinquish all of the claims that arise out of a contract, a tort, or a will contest. It may be used either before or after litigation procedures have begun.

This form will usually be combined with a settlement agreement. For discussion of the interrelation between the two types of documents, see [d], *below*, and § 77.17[5].

A sliding scale settlement agreement for use during litigation to settle with one of multiple tortfeasors without releasing any of them is *set forth in* § 77.263[2]. For an exculpatory release (a release of liability for possible future claims), and discussion, see § 77.250.

[b] Release Given to One of Several Obligors

This form contains optional language, at the end of the first paragraph, that may be included when only one of several obligors is to be released. A release of one of two or more joint obligors does not extinguish the obligations of any of the others (unless they are merely guarantors) or affect their right of contribution from the released obligor, except as provided in *Code Civ. Proc. § 877 [Civ. Code § 1543]*.

When a release is given in good faith before a verdict or judgment to one or more of a number of tortfeasors allegedly liable for the same tort, or to one or more other co-obligors mutually subject to contribution rights, it does not discharge any of the other tortfeasors or co-obligors not specifically released [*Code Civ. Proc. § 877(a)*]. Thus, for example, the release of a corporation's subsidiary does not release the parent corporation [*Mesler v. Bragg Management Co. (1985)*]

39 Cal. 3d 290, 303-304, 216 Cal. Rptr. 443, 702 P.2d 601] . However, the claims against the others will be reduced by the amount stipulated in the release or the consideration paid for it, whichever is greater [Code Civ. Proc. § 877(a)], and the released obligor will be discharged from liability for contribution to the others [Code Civ. Proc. § 877(b)]. For further discussion of releases given to fewer than all of a number of joint tortfeasors, see § 77.18[5][a].

[c] Cautionary Elements

This form contains space for the individual obligee to initial a statement that he or she has read the provisions of Civ. Code § 1542 regarding the release of unknown claims, a signature block for witnesses, and a declaration to be signed by the obligee's attorney. None of these features is specifically required by law, and the failure to include them in a given case may not affect the validity or scope of the release. However, they may be helpful to show that the release was knowingly made [see [e][ii], below].

[d] Attorney's Authority to Settle Claim

An attorney must be specifically authorized to settle a client's claim if the attorney's settlement is to bind the client. Mere employment of an attorney does not mean that the attorney has any implied or ostensible authority to bind the client to a compromise settlement of pending litigation [*Linsk v. Linsk* (1969) 70 Cal. 2d 272, 276-278, 74 Cal. Rptr. 544, 449 P.2d 760 ; *Bice v. Stevens* (1958) 160 Cal. App. 2d 222, 231-232, 325 P.2d 244] . For further discussion and a letter from a client authorizing the attorney to settle a claim, see § 77.270.

[e] Release Defined and Contrasted With Compromise and Settlement

A release operates as an abandonment or relinquishment of the underlying claim [see *Pellett v. Sonotone Corp.* (1945) 26 Cal. 2d 705, 711, 160 P.2d 783] . It contrasts in this respect with the compromise agreement that is the product of a compromise and settlement. The compromise agreement, in general, bars reopening of the original controversy, rather than relinquishing it [*County of Los Angeles v. Law Bldg. Corp.* (1967) 254 Cal. App. 2d 848, 853, 62 Cal. Rptr. 542] . The two types of documents are usually combined in order to obtain an agreement that completely and unequivocally relinquishes, bars, and extinguishes the obligation involved [see § 77.17[5]].

Combined compromise agreements and releases are *set forth in* §§ 77.260[2] and 77.261[2]. A sliding scale settlement agreement for use during litigation to settle with one of multiple tortfeasors without releasing any of them is *set forth in* § 77.263[2].

[f] Claims Extinguished by General Release

A general release does not cover claims that the obligee does not either know or suspect to exist in his or her favor at the time the release is executed, when those claims, if known by the obligee, would have materially affected the settlement with the obligor [Civ. Code § 1542]. However, the law does not prevent all settlements for unknown claims; it simply prevents a mere recital in the release to that effect from barring later-discovered claims [*Casey v. Proctor* (1963) 59 Cal. 2d 97, 109, 28 Cal. Rptr. 307, 378 P.2d 579] .

[g] Unknown Claims

An obligee who is conscious and knows the significance of his or her act may intelligently release all unknown claims [*Casey v. Proctor* (1963) 59 Cal. 2d 97, 109, 28 Cal. Rptr. 307, 378 P.2d 579 ; *Carmichael v. Industrial Acc. Comm.* (1965) 234 Cal. App. 2d 311, 44 Cal. Rptr. 470] . However, one cannot release unknown claims merely by making a general reference to unknown claims. In order to apply a release to unknown claims, it must be shown, apart from the words of the release, that there was an intent to include those claims [*Casey v. Proctor* (1963) 59 Cal. 2d 97, 109, 28 Cal. Rptr. 307, 378 P.2d 579] . Whether one consciously intended to release unknown claims is a question of fact [*Commercial Ins. Co. v. Copeland* (1967) 248 Cal. App. 2d 561, 56 Cal. Rptr. 794 ; *Carmichael v. Industrial Acc.*

Comm. (1965) 234 Cal. App. 2d 311, 44 Cal. Rptr. 470] and depends on whether the release was knowingly made [*Casey v. Proctor (1963) 59 Cal. 2d 97, 113, 28 Cal. Rptr. 307, 378 P.2d 579*]. To provide evidence that the release was knowingly made, this form provides space for the individual obligee to initial a statement that he or she has read the provisions of *Civ. Code § 1542* regarding the release of unknown claims, a signature block for witnesses, and a declaration for the obligee's attorney to sign at the end of the form.

For additional discussion of the obligee's right to avoid application of a release to unknown claims, see § 77.271[1][d].

[h] Insurance Bad Faith Claims

Claims that an insurer has committed unfair claims settlement practices (insurance bad faith claims) [see *Ins. Code § 790.03(h)*] are not necessarily released by a general release that names both a defendant and his or her insurer. When the release specifically excepts and reserves a plaintiff's right to assert a bad faith action, that right is not released [*Vega v. Western Employers Ins. Co. (1985) 170 Cal. App. 3d 922, 216 Cal. Rptr. 592*]. When the release does not expressly cover such claims and contains a waiver of unknown claims under *Civ. Code § 1542*, parol evidence is admissible to determine the intent of the obligee [*Vega v. Western Employers Ins. Co. (1985) 170 Cal. App. 3d 922, 216 Cal. Rptr. 592*].

In view of these rules, if an insurer is to be released from bad faith claims, that condition should be stated specifically in the release. On the other hand, if an insurer is not to be released from such claims, the release should specifically reserve the obligee's right to assert them.

[i] Consideration

A written formal release requires no consideration [*Civ. Code § 1541*; *Worthington v. State Bd. of Control (1968) 266 Cal. App. 2d 697, 700, 72 Cal. Rptr. 449*]. This form includes an optional phrase reciting consideration. In contrast, compromise agreements are contracts and do require consideration [see, e.g., §§ 77.260, 77.261]. For discussion of an obligee's liability for income taxes on sums received as consideration for a settlement, see § 77.262[1][f].

Consideration is mandatory for an oral release [*Civ. Code § 1541*]. For further discussion of consideration in the latter context, see § 77.18[4][a].

[j] Mutual Assent

A release is a settlement of those matters as to which the minds of the parties have met. It may not be considered to be in satisfaction of anything to which they do not consent. In other words, mutual assent of the parties is required. As with other contracts, assent to a release is not real and free when obtained through fraud, and a release based on fraud may be avoided [*King v. Associated Construction Corp. (1960) 183 Cal. App. 2d 818, 822, 7 Cal. Rptr. 182*].

[k] Type Size

A release prepared by the obligor may be held unenforceable if it is printed in a type size that cannot easily be read by a person of ordinary vision, or is so small that one could conclude that the party offering it for execution does not intend it to be read, or is calculated to conceal and not to warn the unwary. A release printed in 10-point type would comport with the minimum type size prescribed by numerous statutes for special types of contracts or contract language [*Hulsey v. Elsinore Parachute Center (1985) 168 Cal. App. 3d 333, 339, 214 Cal. Rptr. 194*].

[l] Clear and Explicit Language

A release prepared by the obligor, when read as a whole, must clearly notify the obligee of the effect of signing the agreement [*Hulsey v. Elsinore Parachute Center (1985) 168 Cal. App. 3d 333, 341, 214 Cal. Rptr. 194*]. A statement

that the obligee will "save harmless and keep indemnified" the obligor does not reasonably alert a lay person to the significance of the release and is not sufficiently clear and explicit to validate it [*Ferrell v. Southern Nevada Off-Road Enthusiasts, Ltd.* (1985) 147 Cal. App. 3d 309, 314-319, 195 Cal. Rptr. 90] . In other words, a release should not disguise its operative language in legalese; it should be prepared in simple, clear, and unambiguous language that is understandable to any lay person [see *Hulsey v. Elsinore Parachute Center* (1985) 168 Cal. App. 3d 333, 341, 214 Cal. Rptr. 194] .

[m] Legal Object

If the intent of a release is to exempt a person from responsibility for his or her own fraud, willful injury to another's person or property, or violation of law (whether willful or negligent), it is against public policy [Civ. Code § 1668; see, e.g., *Health Net of California, Inc. v. Department of Health Services* (2003) 113 Cal. App. 4th 224, 226-227, 6 Cal. Rptr. 3d 235 (contractual clause that prohibited any recovery of damages, but not equitable relief, for any violation of statutory or regulatory law not made part of the parties' contractual obligations was held invalid under Civ. Code 1668)]. Exculpatory releases from liability for future simple negligence or strict liability are not necessarily against public policy [*Hulsey v. Elsinore Parachute Center* (1985) 168 Cal. App. 3d 333, 339, 214 Cal. Rptr. 194 (sports activities)]. For discussion and an exculpatory release, see § 77.250.

[n] Delay After Confinement in Clinic or Health Facility for Injury

A general release of claims arising from a personal injury that is obtained from any person during the first period of physical confinement in a clinic or health facility within 15 days after the commencement of confinement or before release from confinement, whichever occurs first, is presumed fraudulent [Bus. & Prof. Code § 6152(b)]. Confinement includes either inpatient or outpatient care [Bus. & Prof. Code § 6152(b)].

While a release form could lawfully be executed on or after the 16th day of a client's treatment [Bus. & Prof. Code § 6152(b)], as a matter of prudence and general practice, a release should not be executed until well after the initial period of treatment has been completed and certainly more than 15 days after the client has left the initial treatment facility. The form in [2], below, includes a declaration by the obligee that he or she was not confined for treatment when the release was signed.

[2] FORM

General Release--Existing Known and Unknown Claims--Single Adverse Party

GENERAL RELEASE OF EXISTING CLAIMS

_____[name of obligee], _____[street address], _____[city],
County of _____, California, hereinafter referred to as Obligee, and _____[name of
obligor], _____[street address], _____[city], County of _____,
California, hereinafter referred to as Obligor, in consideration of the promises made herein, agree as follows.

1. General Release. Obligee, _____[add, if appropriate: in consideration of the sum of
\$_____, receipt of which is acknowledged, and] being of lawful age, on behalf of [himself or herself]
and _____[his or her] heirs, executors, administrators, and assigns, hereby fully releases and
discharges _____[name of obligor] and _____[his or her] successors in interest from,
and relinquishes all rights, claims, and actions that Obligee now has or may have after the execution of this release
against Obligor and _____[his or her] successors in interest, arising out of [a contract entered into
between Obligee and Obligor on _____(date), at _____(place), and entitled
_____, a copy of which is attached or _____(specify event, e.g., an accident or the
use of a defective _____(name or type of product or property) that occurred on

_____ (date), at or about _____ (time), and as the proximate result of which Obligee suffered _____ (describe claim in terms of injuries, damage, and loss) and other unknown injuries or damage]. _____ [Add, if obligee reserves claims against others: Obligee's acceptance of the sum specified constitutes consideration only for the release and relinquishment of Obligee's claims against Obligor insofar as the _____ (damages or loss or injuries) specified may be attributable to Obligor. This release applies only to Obligor. Obligee expressly reserve any and all causes of action arising out of the specified _____ (specify, e.g., contract) that Obligee may have against any and all other parties (whether or not named in this release).]

2. Unknown Claims.

(a) Obligee acknowledges and agrees that this release applies to all claims for injuries, damages, or losses to Obligee's person and property, real or personal (whether those injuries, damages, or losses are known or unknown, foreseen or unforeseen, or patent or latent), that Obligee may have against Obligor, and Obligee hereby waives application of *Civil Code Section 1542*.

(b) Obligee certifies that _____ [he or she] has read the following provisions of *Civil Code Section 1542*:

"A general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing the release, which if known by him must have materially affected his settlement with the debtor."

and indicates that fact by signing _____ [his or her] initials here: [obligee's initials].

(c) Obligee understands and acknowledges that in consequence of this waiver of *Civil Code Section 1542*, even if _____ [he or she] should eventually suffer additional damages arising out of the facts referred to in Paragraph 1, _____ [he or she] will not be able to make any claim for those damages. Furthermore, Obligee acknowledges that _____ [he or she] intends these consequences even as to claims for damages that may exist as of the date of this release but that Obligee does not know exist, and that, if known, would materially affect Obligee's decision to execute this release, regardless of whether Obligee's lack of knowledge is the result of ignorance, oversight, error, negligence, or any other cause.

[EITHER, to reserve right to assert insurance bad faith claims:]

(d) Obligee expressly excludes from the operation of this release the right to assert any claim that Obligor's insurer, _____ [name of insurer], is liable for any acts taken in connection with the processing and settlement of claims described in Paragraph 1, including but not limited to any acts denominated as unfair claims settlement practices under the California Insurance Code.

[OR, to expressly release insurer from insurance bad faith claims:]

(d) Obligee expressly agrees that this release shall operate to release, relinquish, and discharge Obligor's insurer, _____ [name of insurer], from any liability for acts taken in connection with the processing and settlement of claims described in Paragraph 1, including but not limited to any acts denominated as unfair claims settlement practices under the California Insurance Code.

[CONTINUE]

3. Advice of Attorney. Obligee warrants and represents that in executing this release, _____ [he or she] has relied on legal advice from an attorney licensed to practice in the State of California, who is the attorney of _____ [his or her] choice, that the terms of this release and its consequences have been completely read and explained to Obligee by that attorney, and that Obligee fully understands the terms of this release.

4. Data Relied On. Obligee acknowledges and represents that _____ [he or she] has been apprised of all relevant information and data furnished by _____ [name of expert], a [occupation of expert], and all other information relevant to _____ [his or her] claim and this release, including, without limitation [specify, e.g., future risks, complications, and costs]. Obligee further acknowledges and represents that, in executing this release, _____ [he or she] has not relied on any inducements, promises, or representations made by Obligor or any party representing or serving Obligor.

5. Conditions of Execution. Obligee acknowledges and warrants that _____ [his or her] execution of this release is free and voluntary. _____ [Add, if release concerns personal injury claim: Obligee further declares that at the time _____ (he or she) executed this release, _____ (he or she) was neither a patient in nor an outpatient of a medical facility for treatment of the injury that gave rise to the claim to which this release relates.]

READ THE ABOVE CAREFULLY BEFORE SIGNING

Executed _____ [date] at _____ [city], California.

_____ [signature of obligee]
 _____ [typed name]

Declaration of Witness

I certify that the Obligee acknowledged in my presence that _____ [he or she] read and fully understood the meaning and consequences of the foregoing release, and signed it in my presence.

Executed _____ [date] at _____ [city], California.

_____ [signature of witness]
 _____ [typed name and address]

Declaration of Attorney

I, _____ [name of attorney], _____ [address], am a member of the State Bar of California and attorney for Obligee. I certify that I am satisfied that Obligee fully understands the effect, significance, and consequence of the release set forth above.

Executed _____ [date] at _____ [city], California.

_____ [signature of attorney]
 _____ [typed name]

Legal Topics:

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

Civil ProcedureSettlementsReleases From LiabilityGeneral OverviewCivil ProcedureSettlementsSettlement
AgreementsGeneral OverviewContracts LawTypes of ContractsReleasesContracts LawTypes of ContractsSettlement
Agreements



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DIVISION V: CONTRACTS AND OBLIGATIONS

CHAPTER 77 DISCHARGE OF OBLIGATIONS

PART IV. FORMS

C. Settlement

1. Release of Existing or Pending Claim

27-77 California Legal Forms--Transaction Guide §§ 77.241-77.249

[Reserved]

§§ 77.241[Reserved]



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CHAPTER 77 DISCHARGE OF OBLIGATIONS

PART IV. FORMS

C. Settlement

2. Exculpatory Releases

27-77 California Legal Forms--Transaction Guide § 77.250

§ 77.250 Release of Future Claims--Hazardous Activity

[1] Comment

[a] Use of Form

The form in [2], *below*, is an exculpatory release of any future claim that might result from any act other than fraud, willful injury to another's person or property, or violation of law (whether willful or negligent) [see [f], *below*]. It is designed to be used in situations when the obligee will engage in some type of hazardous activity (such as skydiving, white-water rafting, auto racing, and the like). It can be modified to apply to situations in which a party is to be released from liability for any other act (except fraud, willful injury to another's person or property, or violation of law).

As an alternative to the use of a separate release agreement such as this form, an exculpatory release clause can be included in the contract itself. The extent to which such a provision will be effective is governed by the factors discussed [f] and [g], *below*. For an exculpatory contract provision, see Ch. 75, *Formation of Contracts and Standard Contractual Provisions*.

[b] When Form May Not Be Used

This form may not be used to release another party from the effects of that party's fraud, willful injury to another's person or property, or violation of law [Civ. Code § 1668; see [f], *below*]. Moreover, an exculpatory release may not be used by a hospital, a physician, or any other party when the activity involved is affected by a public interest [see [g], *below*].

[c] Patients' Consents

In situations involving a hospital-patient or physician-patient relationship, a consent form should be used instead of this form. In order to avoid liability for battery, a hospital or physician must obtain the patient's consent before performing any medical or surgical procedures [see *Kritzer v. Citron* (1950) 101 Cal. App. 2d 33, 38-39, 224 P.2d 808].

Furthermore, consent must be informed if the physician or hospital is to avoid liability for negligent failure to comply with the duty to make reasonable disclosure of the available choices and dangers [*Cobbs v. Grant* (1972) 8 Cal. 3d 229, 243, 104 Cal. Rptr. 505, 502 P.2d 1] . A patient's consent to treatment is set forth in Ch. 104, *Health Care Transactions, Consents, and Directives* .

[d] Type Size

A release prepared by the obligor may be held unenforceable if it is printed in a type size that cannot easily be read by a person of ordinary vision, or is so small that one could conclude that the party offering it for execution does not intend it to be read, or is calculated to conceal and not to warn the unwary. A release printed in 10-point type would comport with the minimum type size prescribed by statutes for special types of contracts or contract language [*Hulsey v. Elsinore Parachute Center* (1985) 168 Cal. App. 3d 333, 339, 214 Cal. Rptr. 194] . In an analogous field, it has been held that a warranty disclaimer must be conspicuous, that is, in boldface capital letters [*Dorman v. International Harvester Co.* (1975) 46 Cal. App. 3d 11, 18, 20, 120 Cal. Rptr. 516] . Thus, it is recommended that an exculpatory release be printed in at least 10-point boldface capital letters.

[e] Clear and Explicit Language

A release prepared by the obligor, when read as a whole, must clearly notify the obligee of the effect of signing it [*Hulsey v. Elsinore Parachute Center* (1985) 168 Cal. App. 3d 333, 341, 214 Cal. Rptr. 194] . A statement that the obligee will "save harmless and keep indemnified" the obligor does not reasonably alert a lay person to the significance of the release and is not sufficiently clear and explicit to validate it [*Ferrell v. Southern Nevada Off-Road Enthusiasts, Ltd.* (1983) 147 Cal. App. 3d 309, 312, 195 Cal. Rptr. 90] . In other words, a release should not disguise its operative language in legalese; it should be prepared in simple, clear, and unambiguous language that is understandable to any lay person [see *Hulsey v. Elsinore Parachute Center* (1985) 168 Cal. App. 3d 333, 341, 214 Cal. Rptr. 194] .

[f] Exculpatory Releases in General

A contract is against public policy if its object is to exempt a person from responsibility for his or her own fraud, willful injury to another's person or property, or violation of law (whether willful or negligent) [Civ. Code § 1668; *Barkett v. Brucato* (1953) 122 Cal. App. 2d 264, 277-278, 264 P.2d 978] . However, the law does not invalidate contracts that seek to release one from liability for future simple negligence or strict liability (exculpatory release) [*Hulsey v. Elsinore Parachute Center* (1985) 168 Cal. App. 3d 333, 339, 214 Cal. Rptr. 194 (sports activities)] or passive negligence [*Barkett v. Brucato* (1953) 122 Cal. App. 2d 264, 276, 264 P.2d 978] , as long as it affects only the private affairs of the parties [see *Farnham v. Superior Court* (1997) 60 Cal. App. 4th 69, 77-78, 70 Cal. Rptr. 2d 85 ; *Barkett v. Brucato* (1953) 122 Cal. App. 2d 264, 276, 264 P.2d 978] . On the other hand, an agreement made in the context of sports or recreational programs or services, purporting to release anyone from liability for future gross negligence, generally is unenforceable as a matter of public policy [*City of Santa Barbara v. Superior Court (Janeway)* (2007) 41 Cal. 4th 747, 62 Cal. Rptr. 3d 527, 161 P.3d 1095, 2007 Cal. LEXIS 7603, at *3] . For further discussion, see § 77.18[6][a].

[g] Release Affecting Public Interest

An exculpatory release that "affects the public interest" is invalid [*Tunkl v. Regents of University of Cal.* (1963) 60 Cal. 2d 92, 96, 32 Cal. Rptr. 33, 383 P.2d 441 (hospital); *YMCA of Metropolitan Los Angeles v. Superior Court* (1997) 55 Cal. App. 4th 22, 27, 63 Cal. Rptr. 2d 612 (community center); *Belshaw v. Feinstein* (1968) 258 Cal. App. 2d 711, 727, 65 Cal. Rptr. 788 (surgeon)]. An exculpatory release may affect the public interest and be invalid if the transaction exhibits any of the characteristics outlined in *Tunkl v. Regents of University of Cal.* (1963) 60 Cal. 2d 92, 96, 32 Cal. Rptr. 33, 383 P.2d 441 [see *Gavin W. v. YMCA of Metropolitan Los Angeles* (2003) 106 Cal. App. 4th 662, 671-674, 131 Cal. Rptr. 2d 168 (holding that agreement exculpating child care provider from its own negligence was void as against public policy and finding that contract involved public interest under *Tunkl* criteria); see also § 77.18[6][b]].

[2] FORM**Release of Future Claims--Hazardous Activity****AGREEMENT AND RELEASE FROM LIABILITY**

1. Voluntary Participation. I, _____ [name of obligee], acknowledge that I have voluntarily applied to [describe activity other than fraud, willful injury, or violation of law involving private affairs of parties that is not affected by public interest, e.g., participate in _____ (specify, e.g., parachute instruction, training, and jumping)] at the premises of _____ [name of obligor], located at _____ [address].

2. Assumption of Risk. I AM AWARE THAT _____ [describe activity] IS A HAZARDOUS ACTIVITY. I AM VOLUNTARILY PARTICIPATING IN THESE ACTIVITIES WITH KNOWLEDGE OF THE DANGER INVOLVED, HEREBY AGREE TO ACCEPT ANY AND ALL RISKS OF INJURY OR DEATH, AND VERIFY THIS STATEMENT BY PLACING MY INITIALS HERE: _____.

3. Release. As consideration for being permitted by _____ [name of obligor] to participate in these activities and use related facilities, I hereby agree that I, my assignees, heirs, distributees, guardians, and legal representatives will not make a claim against, sue, or attach the property of _____ [name of obligor] on account of injury or damage resulting from the negligence or other acts, howsoever caused, by any employee, agent, or contractor of _____ [name of obligor] as a result of my participation in _____ [describe activity]. I hereby release _____ [name of obligor] from all actions, claims, or demands that I, my assignees, heirs, distributees, guardians, and legal representatives now have or may hereafter have for injury or damage resulting from my participation in _____ [describe activity].

4. Knowing and Voluntary Execution. I HAVE CAREFULLY READ THIS RELEASE AND FULLY UNDERSTAND ITS CONTENTS. I AM AWARE THAT THIS IS A RELEASE OF LIABILITY AND A CONTRACT BETWEEN ME AND _____ [name of obligor] AND SIGN IT OF MY OWN FREE WILL.

Executed _____ [date] at _____ [city], California.

[signature of obligee]

[typed name]

Declaration of Witness

I certify that _____ [name of obligee] acknowledged in my presence that _____ [he or she] read and fully understood the meaning and consequences of the foregoing release, and signed it in my presence.

Executed _____ [date] at _____ [city], California.

[signature of witness]

[typed name and address]

Legal Topics:

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

Civil Procedure Settlements Releases From Liability General Overview Civil Procedure Settlements Settlement

AgreementsGeneral OverviewContracts LawTypes of ContractsReleasesContracts LawTypes of ContractsSettlement
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DIVISION V: CONTRACTS AND OBLIGATIONS

CHAPTER 77 DISCHARGE OF OBLIGATIONS

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2. Exculpatory Releases

27-77 California Legal Forms--Transaction Guide §§ 77.251-77.259

[Reserved]

§§ 77.251[Reserved]



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DIVISION V: CONTRACTS AND OBLIGATIONS

CHAPTER 77 DISCHARGE OF OBLIGATIONS

PART IV. FORMS

C. Settlement

3. Compromise and Settlement Agreements

27-77 California Legal Forms--Transaction Guide § 77.260

§ 77.260 Compromise and Settlement Agreement--Lump Sum Payment--Absence of Cross Claim

[1] Comment

[a] Use of Form

The form in [2], below, is a compromise or settlement agreement (properly referred to as a "compromise and settlement agreement") coupled with a release. It is suitable for use with respect to any type of dispute, whether arising from contract, tort, or probate. It is intended for use when one party has asserted a claim and the other has not, the dispute has been settled, and the other party desires to extinguish his or her obligations to the claimant and have the claimant relinquish his or her cause of action on the payment of a lump sum to the obligee. For a form to use when there is a cross-complaint, see § 77.261[2].

For a structured settlement agreement coupled with a release in consideration of multiple payments out of an annuity purchased by an insurer for that purpose, see § 77.262[2]. For a sliding scale agreement [see *Code Civ. Proc.* § 877.5] to use during litigation against multiple tortfeasors to settle a plaintiff's claim against one of the defendants, see § 77.263[2].

For discussion of the need for an attorney to have specific authority to settle a client's claim, and a letter from a client authorizing his or her attorney to settle a claim, see § 77.270.

[b] Use of Form During or Before Litigation

This form assumes that the matter in question is already the subject of litigation. It can be modified for claims that are not yet in litigation by deleting all references to the judicial proceeding and substituting a simple description of the claim. The form further provides that the judicial proceeding will be disposed of by dismissal of the complaint with prejudice. If the matter will be disposed of by some other method, such as entry of judgment, the appropriate references in the form should be modified accordingly.

The party seeking the settlement of a matter that is in litigation may serve a written offer on the other party to allow judgment to be taken pursuant to the terms of the offer [*Code Civ. Proc.* § 998]. For discussion, see § 77.17[7].

[c] Release Used With Compromise Agreement

A release is commonly used in conjunction with a compromise agreement [see, e.g., *Argonaut Ins. Exchange v. Industrial Acci. Com.* (1958) 49 Cal. 2d 706, 710-711, 321 P.2d 460 ; *Gregory v. Hamilton* (1978) 77 Cal. App. 3d 213, 142 Cal. Rptr. 563] . This practice has the effect of a relinquishment of the claim by means of the release [see *Pellett v. Sonotone Corp.* (1945) 26 Cal. 2d 705, 711, 160 P.2d 783] and a bar to the reopening of the claim through the compromise agreement [*County of Los Angeles v. Law Bldg. Corp.* (1967) 254 Cal. App. 2d 848, 853, 62 Cal. Rptr. 542] . For discussion of releases in general, see § 77.18. The requirements for a valid release are covered in § 77.18[4]. The release of an unknown claim is discussed in § 77.18[2].

[d] Definition of Compromise and Settlement

A compromise and settlement, as it is known in California, is a settlement of differences or adjustment of conflicting claims by mutual concessions. The term does not include the discussions or negotiations that lead to the compromise and settlement agreement [*Isaacson v. City of Oakland* (1968) 263 Cal. App. 2d 414, 421, 69 Cal. Rptr. 379] . For further discussion and the distinctions between a compromise agreement and an accord and satisfaction or a release, see § 77.17. For discussion of the elements of a valid compromise agreement, see § 77.17[6].

[e] Income Tax Treatment of Damage Awards

Gross income does not include the amount of any damages received, whether by suit or agreement, on account of personal injury or sickness. This is true whether the amount received is in the form of a lump sum payment or periodic payments [*I.R.C.* § 104(a)(2)]. There is no statutory exclusion of any other type of damages recovery. The term "damages," for the purpose of this exclusion, means the amount received (other than worker's compensation) through prosecution of a legal suit or action based on tort or tort-type rights, or through a settlement agreement entered into in lieu of such a prosecution [*Treas. Reg.* § 1.104-1(c)].

Punitive damages are not excluded from ordinary income under *I.R.C.* § 104(a)(2) [*Rev. Rul.* 84-108, 1984-2 C.B. 32]. Thus, any lump sum settlement agreement must specify the amount allocated to compensatory and punitive damages. A plaintiff who is about to enter into a structured settlement when part of the amount awarded is punitive damages should be advised of his or her liability for income taxes on the portions of the initial payment and subsequent periodic payments that are made in payment of punitive damages.

For further discussion of the taxation of tort damages in general, see Levy, Golden, & Sacks, *California Torts*, Ch. 57, *Taxation of Tort Damages* (Matthew Bender).

[2] FORM

Compromise and Settlement Agreement--Lump Sum Payment--Absence of Cross Claim

COMPROMISE AGREEMENT AND RELEASE

_____[*name of plaintiff*], _____[*address*], hereinafter referred to as Plaintiff, and
 _____[*name of defendant*], _____[*address*], hereinafter referred to as Defendant, in
 consideration of the promises made herein, agree as follows.

1. Nature and Effect of Agreement. This agreement consists of a compromise and settlement by the parties of Plaintiff's claim against Defendant arising from the dispute described in Paragraph 2 and a release given by Plaintiff to

Defendant relinquishing _____ [his or her] claim against Defendant. By executing this agreement, each of the parties intends to and does hereby extinguish the obligations heretofore existing between them and arising from that dispute. This agreement is not, and shall not be treated as, an admission of liability by either party for any purpose.

2. Nature and Status of Dispute. On _____ [date], Plaintiff filed a complaint against Defendant in the Superior Court in and for _____ County (the Court), designated as [case number], alleging [describe nature of action].

3. Compromise Agreement. In consideration of _____ [specify consideration, e.g., the payment of \$_____ by Defendant to Plaintiff], Plaintiff hereby compromises and settles any and all past, present, or future claims, demands, obligations, or causes of action for compensatory or punitive damages, costs, losses, expenses, and compensation, whether based on tort, contract, or other theories of recovery, that Plaintiff now has or may hereafter have against Defendant, Defendant's predecessors and successors in interest, heirs, and assigns arising from the subject matter of the complaint described in Paragraph 2, and agrees that this compromise and settlement shall constitute a bar to all such claims. Plaintiff agrees to dismiss with prejudice the complaint against Defendant described in Paragraph 2. Plaintiff and Defendant agree that this compromise and settlement shall constitute a bar to all past, present, and future claims arising out of the subject matter of the action described in Paragraph 2.

4. Release and Discharge. Plaintiff hereby releases and discharges Defendant, Defendant's predecessors and successors in interest, heirs, and assigns from, and relinquishes, any and all past, present, or future claims, demands, obligations, or causes of action for compensatory or punitive damages, costs, losses, expenses, and compensation, whether based on tort, contract, or other theories of recovery, that Plaintiff now has or may hereafter have against Defendant arising from the subject of the complaint described in Paragraph 2.

5. Unknown Claims.

(a) Plaintiff acknowledges and agrees that the release that _____ [he or she] gives to Defendant on executing this agreement applies to all claims for injuries, damages, or losses to Plaintiff's person and property, real or personal (whether those injuries, damages, or losses are known or unknown, foreseen or unforeseen, or patent or latent) that Plaintiff may have against Defendant, and Plaintiff thereby waives application of *Civil Code Section 1542*.

(b) Plaintiff certifies that _____ [he or she] has read the following provisions of *Civil Code Section 1542*:

"A general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing the release, which if known by him must have materially affected his settlement with the debtor."

and indicates that fact by signing _____ [his or her] initials here: [plaintiff's initials].

(c) Plaintiff understands and acknowledges that in consequence of this waiver of *Civil Code Section 1542*, even if _____ [he or she] should eventually suffer additional damages arising out of the facts referred to in Paragraph 2, _____ [he or she] will not be able to make any claim for those damages. Furthermore, Plaintiff acknowledges that _____ [he or she] intends these consequences even as to claims for damages that may exist as of the date of this release but that Plaintiff does not know exist, and that, if known, would materially affect Plaintiff's decision to execute this release, regardless of whether Plaintiff's lack of knowledge is the result of ignorance, oversight, error, negligence, or any other cause.

[EITHER, to reserve right to assert insurance bad faith claims:]

(d) Plaintiff expressly excludes from the operation of this release the right to assert any claim that Defendant's insurer, _____[*name of insurer*], is liable for any acts taken in connection with the processing and settlement of claims described in Paragraph 2, including but not limited to acts denominated as unfair claims settlement practices under the California Insurance Code.

[OR, to expressly release insurer from insurance bad faith claims:]

(d) Plaintiff expressly agrees that this release shall operate to release, relinquish, and discharge Defendant's insurer, _____[*name of insurer*], from any liability for acts taken in connection with the processing and settlement of claims described in Paragraph 2, including but not limited to acts denominated as unfair claims settlement practices under the California Insurance Code.

[CONTINUE]

6. Advice of Attorney. Each party warrants and represents that in executing this agreement, _____[he or she] has relied on legal advice from the attorney of _____[his or her] choice; that the terms of this agreement have been read and its consequences (including risks, complications, and costs) have been completely explained to [him or her] by that attorney; and that _____[he or she] fully understands the terms of this agreement. Plaintiff further acknowledges and represents that, in executing this release, _____[he or she] has not relied on any inducements, promises, or representations made by Defendant or any party representing or serving Defendant.

7. Conditions of Execution. Each party acknowledges and warrants that _____[his or her] execution of this release is free and voluntary. _____[Add, if release concerns personal injury claim: Plaintiff further declares that at the time _____ (he or she) executed the release set forth in this agreement, _____ (he or she) was neither a patient in nor an outpatient of a medical facility for treatment of the injury that gave rise to the claim to which that release relates.]

8. Execution of Other Documents. Plaintiff shall direct _____[his or her] attorney to execute a dismissal with prejudice of the complaint described in Paragraph 2, file it in the proper court, and deliver an executed copy to counsel for Defendant. Each party to this agreement shall cooperate fully in the execution of any and all other documents and in any additional acts that may be necessary or appropriate to give full force and effect to the terms and intent of this agreement.

9. Attorneys' fees. Each party to this agreement shall bear all attorneys' fees and costs arising from that party's own counsel in connection with the complaint, this agreement, and the matters referred to herein, the dismissal of the complaint, and all related matters. This paragraph shall be applicable to this entire agreement.

10. Entire Agreement. This agreement contains the entire agreement between the parties.

11. Effective Date. This agreement shall become effective immediately on execution by Plaintiff and Defendant.

12. Governing Law. This agreement is entered into, and shall be construed and interpreted, in accordance with the laws of the State of California.

Executed _____[date] at _____[city], California.

PLAINTIFF

DEFENDANT

Legal Topics:

Civil ProcedureSettlementsReleases From LiabilityGeneral OverviewCivil ProcedureSettlementsSettlement
AgreementsGeneral OverviewContracts LawTypes of ContractsReleasesContracts LawTypes of ContractsSettlement
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DIVISION V: CONTRACTS AND OBLIGATIONS

CHAPTER 77 DISCHARGE OF OBLIGATIONS

PART IV. FORMS

C. Settlement

3. Compromise and Settlement Agreements

27-77 California Legal Forms--Transaction Guide § 77.261

§ 77.261 Compromise and Settlement Agreement--Lump Sum Payment--Mutual Release of Cross Claims

[1] Comment--Use of Form

The form in [2], below, is a compromise or settlement agreement (properly referred to as a "compromise and settlement agreement") coupled with a mutual release. This form is designed for use when there is a cross-dispute. For a form to use when a single complaint has been filed, and discussion of the law relevant to compromise and settlement agreements and releases, see § 77.260.

This form is suitable for use with respect to any type of dispute, whether arising from contract, tort, or probate. It is intended for use when each party has disputed the other's claims, they have settled their cross-dispute, and desire to extinguish their obligations to each other and relinquish their respective causes of actions on the payment of a lump sum to the obligee.

For a structured settlement agreement coupled with a release in consideration of multiple payments out of an annuity purchased by an insurer for that purpose, see § 77.262[2]. For a sliding scale agreement [see *Code Civ. Proc.* § 877.5] to use during litigation against multiple tortfeasors to settle a plaintiff's claim against one of the defendants, see § 77.263[2].

For discussion of the need for an attorney to have specific authority to settle a client's claim, and a letter from a client authorizing his or her attorney to settle a claim, see § 77.270.

[2] FORM

Compromise and Settlement Agreement--Lump Sum Payment--Mutual Release of Cross Claims

COMPROMISE AGREEMENT AND MUTUAL RELEASE

_____[name of plaintiff], _____[address], hereinafter referred to as Plaintiff, and

_____[*name of defendant and cross-complainant*], _____[*address*], hereinafter referred to as Cross-Complainant, in consideration of the promises made herein, agree as follows.

1. Nature and Effect of Agreement. This agreement consists of a compromise and settlement by each party of that party's claims against the other party and a release given by each party relinquishing all claims against the other party. By executing this agreement, each of the parties intends to and does hereby extinguish the obligations heretofore existing between them. This agreement is not, and shall not be treated as, an admission of liability by either party for any purpose.

2. Nature and Status of Dispute. On _____[*date*], Plaintiff filed a complaint against Cross-Complainant in the Superior Court in and for _____ County (the Court), designated as [*case number*], alleging [*describe nature of action*]. On _____[*date*], Cross-Complainant filed a cross-complaint against Plaintiff in the Court, designated as [*case number*], alleging [*describe nature of cross-action*].

3. Mutual Compromise Agreement. Each party, in consideration of the promises and concessions made by the other, hereby compromises and settles any and all past, present, or future claims, demands, obligations, or causes of action, whether based on tort, contract, or other theories of recovery, that the party now has or may hereafter have against the other party and the other party's predecessors and successors in interest, heirs, and assigns, arising from the subject matter of the actions described in Paragraph 2, on the following terms and conditions:

(a) Cross-Complainant agrees to pay to Plaintiff the sum of \$ _____ in full settlement of Plaintiff's action described in Paragraph 2 and agrees to dismiss with prejudice the complaint against Cross-Complainant.

(b) Plaintiff agrees to pay to Cross-Complainant the sum of \$ _____ in full settlement of Cross-Complainant's cross-action described in Paragraph 2 and agrees to dismiss with prejudice the cross-complaint against Plaintiff.

(c) Plaintiff and Cross-Complainant agree that this compromise and settlement shall constitute a bar to all past, present, and future claims arising out of the subject matter of the actions described in Paragraph 2.

4. Mutual General Release. Each of the parties, on behalf of [himself or herself], _____[*his or her*] descendants, ancestors, dependents, heirs, executors, administrators, and assigns, hereby fully releases and discharges the other party and that party's descendants, ancestors, dependents, heirs, executors, administrators, and assigns, from all rights, claims, and actions that each party now has against the other party arising from the subjects of the complaint and cross-complaint described in Paragraph 2.

5. Unknown Claims.

(a) Each party acknowledges and agrees that the release that _____[*he or she*] gives to the other party on executing this agreement applies to all claims for injuries, damages, or losses to _____[*his or her*] own person and property, real or personal (whether those injuries, damages, or losses are known or unknown, foreseen or unforeseen, patent or latent), that _____[*he or she*] may have against the other party. Each party waives application of *Civil Code Section 1542*.

(b) Each party certifies that _____[*he or she*] has read the following provisions of *Civil Code Section 1542*:

"A general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing the release, which if known by him must have materially affected his settlement with the debtor."

and indicates that fact by signing _____ [his or her] initials here: [plaintiff's initials]
[cross-complainant's initials].

(c) Each party understands and acknowledges that in consequence of this waiver of *Civil Code Section 1542*, even if _____ [he or she] should eventually suffer additional damages arising out of the facts referred to in Paragraph 2, _____ [he or she] will not be able to make any claim for those damages. Furthermore, each party acknowledges that _____ [he or she] consciously intends these consequences even as to claims for damages that may exist as of the date of this release but that _____ [he or she] does not know exist, and that, if known, would materially affect _____ [his or her] decision to execute this release, regardless of whether _____ [his or her] lack of knowledge is the result of ignorance, oversight, error, negligence, or any other cause.

[EITHER, to reserve right to assert insurance bad faith claims:]

(d) [party reserving right, e.g., Each party or Plaintiff or Cross-Complainant] expressly reserves from the operation of this release the right to assert a claim that [specify, e.g., the other party's or Cross-Complainant's or Plaintiff's] insurer is liable as the result of any acts taken in connection with the processing and settlement of claims described in Paragraph 2, including but not limited to acts denominated as unfair claims settlement practices under the California Insurance Code.

[OR, to expressly release insurer from insurance bad faith claims:]

(d) [releasing party, e.g., Each party or Plaintiff or Cross-Complainant] expressly agrees that this release shall operate to release, relinquish, and discharge [e.g., the other party's or Cross-Complainant's or Plaintiff's] insurer from liability for any acts taken in connection with the processing and settlement of claims described in Paragraph 2, including but not limited to acts denominated as unfair claims settlement practices under the California Insurance Code.

[CONTINUE]

6. Advice of Attorney. Each party warrants and represents that in executing this agreement, _____ [he or she] has relied on legal advice from the attorney of _____ [his or her] choice; that the terms of this agreement have been read and its consequences (including risks, complications, and costs) have been completely explained to [him or her] by that attorney; and that _____ [he or she] fully understands the terms of this agreement. Each party further acknowledges and represents that, in executing this release, _____ [he or she] has not relied on any inducements, promises, or representations made by the other party or any person representing or serving the other party.

7. Conditions of Execution. Each party acknowledges and warrants that _____ [his or her] execution of this release is free and voluntary. _____ [Add, if release concerns personal injury claim: Each party further declares that at the time _____ (he or she) executed the release set forth in this agreement, _____ (he or she) was neither a patient in nor an outpatient of a medical facility for treatment of the injury that gave rise to the claim to which that release relates.]

8. Execution of Other Documents. Each party shall direct _____ [his or her] attorney to execute a dismissal with prejudice of the complaint and cross-complaint described in Paragraph 2, file it in the proper court, and deliver an executed copy to counsel for the other party. Each party shall cooperate fully in the execution of any and all other documents and in any additional acts that may be necessary or appropriate to give full force and effect to the terms

and intent of this agreement.

9. Attorneys' Fees. Each party to this agreement shall bear all attorneys' fees and costs arising from that party's own counsel in connection with the complaint or cross-complaint, this agreement, and the matters referred to herein, the dismissal of the complaint and cross-complaint, and all related matters. This paragraph shall be applicable to this entire agreement.

10. Entire Agreement. This agreement contains the entire agreement between the parties.

11. Effective Date. This agreement shall become effective immediately on execution by Plaintiff and Cross-Complainant.

12. Governing Law. This agreement is entered into, and shall be construed and interpreted, in accordance with the laws of the State of California.

Executed _____ [date] at _____ [city], California.

PLAINTIFF

_____ [signature of plaintiff]
 _____ [typed name]

CROSS--COMPLAINANT

_____ [signature of cross-complainant]
 _____ [typed name]

Legal Topics:

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

Civil Procedure Settlements Releases From Liability General Overview Civil Procedure Settlements Settlement Agreements General Overview Contracts Law Types of Contracts Releases Contracts Law Types of Contracts Settlement Agreements



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DIVISION V: CONTRACTS AND OBLIGATIONS

CHAPTER 77 DISCHARGE OF OBLIGATIONS

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§ 77.262 Structured Settlement Agreement and Release

[1] Comment

[a] Use of Form

The form in [2], *below*, is a structured settlement and release agreement for use as an alternative to a lump sum settlement. A structured settlement is generally used when the settlement involves a large sum. It can be useful to the obligee because it provides a direct payment of an initial amount and, if the damages include future medical or similar expenses, ensures that funds will be available to the obligee when they are needed for those purposes (thereby precluding the possibility that a large award might be squandered, leaving no funds to cover future expenses). It can be useful to the obligor because it provides for an allocation of the present value of the amount settled on (generally a smaller amount) either to an annuity or to an income trust for payout to the obligee over a specified period.

For discussion of the use and benefits of structured settlements, security considerations, and the basis for computing the attorneys' fees when they are used, see Levy, Golden, & Sacks, *California Torts*, Ch. 75, *Structured Settlements* (Matthew Bender).

[b] Parties

The form names the defendant's insurer as a party to the agreement, in addition to the plaintiff and defendant. This is done in part for illustrative purposes; actual practice may vary in this regard. Ordinarily, it is unusual for a party's insurer to be a party to a settlement agreement unless the insurer is a party to the action (as when the plaintiff is suing his or her own insurer under the policy). It may be somewhat more appropriate when a structured settlement is involved, inasmuch as the insurer's obligations under such a settlement may be ongoing and more complex than under a lump sum settlement.

[c] Provisions of Form

The form provides for allocation of funds (in the form of a premium or present value) toward the purchase of an annuity to fund monthly payments for the obligee's life, the lives of the obligee and his or her spouse, or some other agreed-on period. Although the form is drafted as an agreement with a single adverse party, it can be adapted for use in settling with one of a number of adverse parties. If there are multiple tortfeasors, a sliding scale agreement [see *Code Civ. Proc.* § 877.5] may be used during litigation to settle the plaintiff's claim against one of the defendants [see § 77.263[2]].

[d] Attorney's Authority to Settle

For discussion of the need for an attorney to have specific authority to settle a client's claim, and a letter from a client authorizing his or her attorney to settle a claim, see § 77.270.

[e] Effect of Structured Settlement on Joint Tortfeasors

A good faith pre-verdict or pre-judgment release given to one or more of a number of tortfeasors allegedly liable for the same tort does not discharge other tortfeasors not specifically released. However, it will operate to reduce the claims against them in the amount stipulated in the release or the consideration paid for it, whichever is greater [*Code Civ. Proc.* § 877(a)], while discharging the released party from liability for contribution to the other tortfeasors [*Code Civ. Proc.* § 877(b)]. In the case of a structured settlement, the amount of the reduction is the amount of the present cash value of the future periodic payments [see *Franck v. Polaris E-Z Go Div. of Textron, Inc. (1984) 157 Cal. App. 3d 1107, 1119-1120, 204 Cal. Rptr. 321*]. For further discussion of releases given to fewer than all of a number of joint tortfeasors, see § 77.18[5][a].

For discussion of the extension of *Code Civ. Proc.* § 877 to other co-obligors besides joint tortfeasors, see § 77.18[5][a].

[f] Income Tax Treatment of Structured Settlement Payments

Damages recovered for personal injuries (except punitive damages) are excluded from gross income for the purpose of computing the recipient's income tax [*I.R.C.* § 104(a)(2)]. The general rule excluding nonpunitive damages recovered for personal injuries from gross income applies whether the recovery is received as a lump sum or in the form of periodic payments [*I.R.C.* § 104(a)(2)], as long as the recipient does not have constructive receipt of the deferred funds [*Rev. Rul.* 79-220, 1979-2 C.B. 74].

Punitive damages are not excluded from ordinary income under *I.R.C.* § 104(a)(2) [*Rev. Rul.* 84-108, 1984-2 C.B. 32]. Thus, any lump sum settlement agreement must specify the amount allocated to compensatory and punitive damages. A plaintiff who is about to enter into a structured settlement when part of the amount awarded is punitive damages should be advised of his or her liability for income taxes on the portions of the initial payment and subsequent periodic payments that are made in payment of punitive damages [see § 77.260[1][e]].

[2] FORM

Structured Settlement Agreement and Release

COMPROMISE AGREEMENT FOR STRUCTURED SETTLEMENT

_____[name of plaintiff], _____[address], hereinafter referred to as Plaintiff, and
 _____[name of defendant], _____[address], referred to as Defendant, and
 _____[name of defendant's insurer], a _____[name of state] corporation,
 _____[address], hereinafter referred to as Insurer, in consideration of the promises made in this
 agreement, agree as follows.

1. Nature of Complaint. On _____ [date], Plaintiff filed a complaint against Defendant in the Superior Court in and for _____ County (the Court), designated as [case number], alleging [describe nature of action].

2. Effect of Agreement. This entire agreement shall constitute full settlement and discharge of all claims that are the subject of the complaint described in Paragraph 1, between Plaintiff and all parties represented by or claiming through Plaintiff, and Defendant and Insurer.

3. Compromise Agreement. In further consideration of the payments provided for in this agreement, Plaintiff hereby compromises and settles any and all past, present, or future claims, demands, obligations, or causes of action for compensatory or punitive damages, costs, losses, expenses, and compensation, whether based on tort, contract, or other theories of recovery, that Plaintiff now has or may hereafter have against Defendant, Defendant's predecessors and successors in interest, heirs, and assigns, arising from the subject of the complaint described in Paragraph 1, and agrees that this compromise and settlement shall constitute a bar to all such claims.

4. Release and Discharge.

(a) In consideration of the payments provided for in this agreement, Plaintiff hereby releases and discharges Defendant, Defendant's predecessors and successors in interest, heirs, and assigns, from, and relinquishes, any and all past, present, or future claims, demands, obligations, or causes of action for compensatory or punitive damages, costs, losses, expenses, and compensation, whether based on tort, contract, or other theories of recovery, that Plaintiff now has or may hereafter have against Defendant arising from the subject of the complaint described in Paragraph 1.

[EITHER, to reserve right to assert insurance bad faith claims:]

(b) Plaintiff expressly excludes from the operation of this release the right to assert any claim that Insurer is liable for any acts taken in connection with the processing and settlement of claims described in Paragraph 1, including but not limited to acts denominated as unfair claims settlement practices under the California Insurance Code.

[OR, to expressly release insurer from insurance bad faith claims:]

(b) Plaintiff expressly agrees that this release shall operate to release and discharge Insurer from any liability for acts taken in connection with the processing and settlement of claims described in Paragraph 1, including but not limited to acts denominated as unfair claims settlement practices under the California Insurance Code.

[CONTINUE]

5. Initial Payment. Concurrently with execution of this agreement, Insurer, on behalf of Defendant, shall pay to Plaintiff the sum of \$_____.

6. Monthly Payments. Subject to the other terms and conditions of this agreement, Insurer further agrees to pay to Plaintiff the sum of \$_____ per month during Plaintiff's lifetime or for [number] months, whichever is the greater period. In the event that Plaintiff dies before the [number, e.g., 36th] monthly payment, the monthly payments provided for herein shall continue to be made from the date of Plaintiff's death until [number] monthly payments have been made to the person designated herein as Plaintiff's contingent beneficiary. The initial monthly payment required under this paragraph shall be made not later than _____ [date]; if an annuity is purchased to fund this requirement, payments shall commence not later than that date and not earlier than one month

from the date the annuity carrier receives a valid premium check from Defendant or Insurer.

7. Source of Payments. Insurer reserves the right to fund its obligation to make the monthly payments provided for herein through the purchase of any type or form of financial instrument, including, but not limited to, an annuity policy purchased from _____[*name*] Insurance Company. If payment is made under an annuity policy or any other type of financial instrument, Insurer may direct that payments be made directly to Plaintiff. Plaintiff and any subsequent payees shall be responsible for notifying Insurer and any other payer of _____[*his or her*] mailing address and of any death that will affect monthly payments under this agreement.

8. Mailing of Payments. The obligations to make the initial payment referred to in Paragraph 5 and the monthly payments referred to in Paragraph 6 shall be discharged when a valid check in the amount of the required payment is mailed to the address designated by the party to whom the payment must be made under the terms of this agreement. Insurer shall not be liable for the failure of the addressee to receive checks mailed in accordance with this provision.

9. Attorneys' Fees. Each party shall bear that party's own attorneys' fees and costs arising in connection with the complaint, this agreement, the matters referred to herein, the dismissal of the complaint, and all related matters. This paragraph shall be applicable to the entire agreement. This provision shall not affect any obligation on the part of Insurer, whether arising out of the insurance contract between Defendant and Insurer or by law, with respect to the payment of Defendant's costs and attorneys' fees.

10. Contingent Beneficiary. If any monthly payments are to be made after the death of Plaintiff, those payments shall be made to the persons designated in writing by Plaintiff to Insurer. Plaintiff may revoke prior designations and make new designations. However, no designation or revocation shall be effective unless it is in writing, executed by Plaintiff, and delivered to Insurer. If Plaintiff fails to make any designation, those payments shall be made _____[*specify, e.g., to Plaintiff's estate*].

11. Unknown Claims.

(a) Plaintiff hereby acknowledges and agrees that the release set forth in Paragraph 4 is a general release that applies to all claims for injuries, damages, or losses to Plaintiff's person and property, real or personal (whether those injuries, damages, or losses are known or unknown, foreseen or unforeseen, or patent or latent), that Plaintiff may have against Defendant, and Plaintiff thereby waives application of *Civil Code Section 1542*.

(b) Plaintiff certifies that _____[*he or she*] has read the following provisions of *Civil Code Section 1542*:

"A general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing the release, which if known by him must have materially affected his settlement with the debtor."

and indicates that fact by signing _____[*his or her*] initials here: [*plaintiff's initials*].

(c) Plaintiff understands and acknowledges that in consequence of this waiver of *Civil Code Section 1542*, even if _____[*he or she*] should eventually suffer additional damages arising out of the facts referred to in Paragraph 1, _____[*he or she*] will not be able to make any claim for those damages. Furthermore, Plaintiff acknowledges that _____[*he or she*] intends these consequences even as to claims for damages that may exist as of the date of this release but that Plaintiff does not know exist, and that, if known, would materially affect Plaintiff's decision to execute this release, regardless of whether Plaintiff's lack of knowledge is the result of ignorance, oversight, error, negligence, or any other cause.

12. Warranties of Plaintiff. Plaintiff warrants and represents that _____[*he or she*] is the only person

having any interest in the claims referred to herein and having the ability, right, and authority to execute this agreement. Plaintiff further warrants and represents that _____ [he or she] is the only person having any right to receive the sums specified herein and has not transferred or otherwise disposed of any of the claims referred to in this agreement. _____ [Add, if claim being released is personal injury claim: Plaintiff further declares that at the time _____ (he or she) executed the release set forth in this agreement, _____ (he or she) was neither a patient in nor an outpatient of a medical facility for treatment of the injury that gave rise to the claim to which that release relates.] Plaintiff further represents and warrants that in executing this agreement, _____ [he or she] has relied on legal advice from the attorney of _____ [his or her] choice, that the terms of this agreement have been completely read and explained to [him or her] by that attorney, and that _____ [he or she] fully understands and voluntarily accepts the terms of this agreement.

13. Execution of Other Documents. Plaintiff shall direct _____ [his or her] attorney to execute a dismissal with prejudice of the action described in Paragraph 1, file it in the proper court, and deliver an executed copy to counsel for Defendant and Insurer. All parties to this agreement shall cooperate fully in the execution of any and all other documents and in any additional acts that may be necessary or appropriate to give full force and effect to the terms and intent of this agreement.

14. Entire Agreement. This agreement contains the entire agreement between Plaintiff, Defendant, and Insurer.

15. Effect on Successors. This agreement shall be binding on, and inure to the benefit of, the successors and assigns and the executors, administrators, personal representatives, and heirs of the Plaintiff, Defendant, and Insurer.

16. Effective Date. This agreement shall become effective immediately on execution by the Plaintiff, Defendant, and Insurer.

17. Governing Law. This agreement is entered into, and shall be construed and interpreted, in accordance with the laws of the State of California.

Executed _____ [date] at _____ [city], California.

PLAINTIFF

_____ [signature of plaintiff]
 _____ [typed name]

DEFENDANT

_____ [signature of defendant]
 _____ [typed name]

INSURER

_____ [name of insurer]
 By: _____ [signature]
 _____ [typed name and title]

Legal Topics:

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

Civil Procedure Settlements Releases From Liability General Overview Civil Procedure Settlements Settlement Agreements General Overview Contracts Law Types of Contracts Releases Contracts Law Types of Contracts Settlement Agreements



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§ 77.263 Sliding Scale Settlement Agreement--Covenant Not to Enforce Judgment Against Settling Defendant

[1] Comment

[a] Use of Form

The form in [2], *below*, is a sliding scale settlement or recovery agreement for use in an action against multiple tortfeasors, to settle with one or more (but fewer than all) of the defendants while continuing the suit against the nonsettling parties. The sliding scale makes the amount of the settling defendant's liability depend on the amount that the plaintiff ultimately recovers from the nonsettling defendants [*see Code Civ. Proc. § 877.5(b); [b], below*].

The form contains a covenant not to enforce any judgment that may subsequently be obtained against the settling defendant. A release may also be obtained from the settling defendant, although that is not required by the statute governing sliding scale recovery agreements [*see Code Civ. Proc. § 877.5(b); [b], below*]. For a simple release that can be used for one of several allegedly liable parties, and relevant discussion, see § 77.240.

For a sliding scale recovery agreement to be effective, a notice of intent to enter into the agreement must be served on all nonsigning defendants at least 72 hours before entering into the agreement. A court may allow a shorter time [*Code Civ. Proc. § 877.5(c); see § 77.264[2] (notice)*].

[b] Sliding Scale Recovery Agreements

A sliding scale recovery agreement is an agreement between a plaintiff or claimant and one or more but not all of the defendants in a tort action, limiting the agreeing defendant's liability to an amount that depends on the amount the plaintiff can recover from the nonagreeing defendants. A sliding scale recovery agreement may be in the form of a release, a covenant not to sue or not to enforce a judgment, or a dismissal. It may also include a provision for a loan to the plaintiff repayable to the agreeing defendant out of any recovery against the nonagreeing defendants [*Code Civ. Proc. § 877.5(b)*].

[c] Determination of Good Faith Settlement

Any party to an action in which two or more parties are alleged to be joint tortfeasors is entitled to a hearing on whether a settlement between the plaintiff or other claimant and one or more alleged tortfeasors was entered into in good faith [Code Civ. Proc. § 877.6(a)]. If the court finds that the settlement was made in good faith, the other joint tortfeasors will be barred from claims against the settling defendant for contribution or indemnity based on comparative negligence or fault [Code Civ. Proc. § 877.6(c)]. The form in [2], below, requires, as a condition precedent to its effectiveness, that the court make such a determination, and further requires one of the parties to move for court approval within a specified number of days after the settlement agreement is executed.

Factors to consider in determining good faith include whether the amount of the settlement is within the reasonable range of the settling defendant's proportional share of comparative liability for the plaintiff's injuries, the financial conditions and policy limits of the settling defendants, and the existence of collusion, fraud, or tortious conduct aimed at injuring the interests of the nonsettling defendants. The evaluation must be made on the basis of information available at the time of settlement. Bad faith is not established by showing that the settling defendant paid less than a theoretical proportional or fair share [*Tech-Bilt, Inc. v. Woodward-Clyde & Associates* (1985) 38 Cal. 3d 488, 499, 213 Cal. Rptr. 256, 698 P.2d 159] .

[2] FORM**Sliding Scale Settlement Agreement--Covenant Not to Enforce Judgment Against Settling Defendant****SLIDING SCALE SETTLEMENT AGREEMENT**

_____[name of plaintiff], _____[address], hereinafter referred to as Plaintiff, and
 _____[name of settling defendant], _____[address], hereinafter referred to as
 Settling Defendant, in consideration of the promises made herein, agree as follows,

1. Nature and Status of Dispute. On _____[date], Plaintiff filed a complaint against Settling Defendant and _____[names of other defendants] in the Superior Court in and for _____ County (the Court), designated as [case number], alleging [describe nature of action] by or on the part of Settling Defendant and the defendants who are not parties to this agreement (Nonsettling Defendants).

2. Sliding Scale Settlement Agreement. Plaintiff hereby agrees to settle all of _____[his or her] claims against Settling Defendant that arise from the complaint described in Paragraph 1, in accordance with the following terms.

(a) If a judgment is rendered in favor of all Nonsettling Defendants and against Plaintiff, Settling Defendant will pay Plaintiff the sum of \$_____.

(b) If Plaintiff reaches a settlement with or obtains a judgment against some or all Nonsettling Defendants, and the combined total of all such settlements or judgments is less than \$_____, Settling Defendant will pay Plaintiff the sum of \$_____.

(c) If Plaintiff reaches a settlement with or obtains a judgment against some or all Nonsettling Defendants, and the combined total of all such settlements or judgments is an amount equal to or in excess of \$_____, Settling Defendant will pay Plaintiff the sum of \$_____.

3. Advance Payment by Loan. Settling Defendant shall advance to Plaintiff the sum of \$_____ as a loan, without interest. This loan shall be made contemporaneously with the execution of this agreement and shall be

repaid only in the event, and to the extent that, the amount lent is greater than the amount that Plaintiff is ultimately entitled to recover from Settling Defendant under Paragraph 2. *[Add, if amount lent is less than maximum amount potentially recoverable under Paragraph 2: Any balance due to Plaintiff from Settling Defendant under the terms of Paragraph 2 shall be paid within _____ (number) days following the final disposition of Plaintiff's claims against all Nonsettling Defendants, whether by execution of a settlement agreement or entry of a final judgment (including any appeals).]*

4. Covenant Not to Enforce Judgment. In consideration of the receipt of payments under this agreement by Settling Defendant to Plaintiff, Plaintiff covenants and agrees that neither Plaintiff nor any person acting on Plaintiff's behalf shall at any time take any action at law or in equity to enforce in any manner any judgment that may subsequently be obtained against Settling Defendant in the action described in Paragraph 1 or in any other action that relates to the subject matter of the action described in Paragraph 1.

5. Pursuit of Claim Against Nonsettling Defendants. Plaintiff agrees to pursue the action described in Paragraph 1 with due diligence and to use all legitimate and reasonable means to collect any judgment obtained against Nonsettling Defendants.

6. Disclaimer of Liability. This agreement shall not constitute an admission of liability by Settling Defendant.

7. Hold Harmless Agreement. Plaintiff agrees to indemnify and hold harmless Settling Defendant against any loss, costs, damage, or liability, including court costs and attorneys' fees, incurred on account of any action taken by Plaintiff in violation of this agreement.

8. Effect on Nonsettling Defendants. Plaintiff and Settling Defendant agree that this agreement is not intended as, and shall not be deemed to be, a release of any cause of action that Plaintiff has against Nonsettling Defendants or any of them arising out of the facts and incidents involved in the action described in Paragraph 1. Plaintiff and Settling Defendant expressly acknowledge that Nonsettling Defendants are not parties to this agreement and that this agreement is not intended to benefit Nonsettling Defendants in any manner.

9. Determination of Good Faith as Condition Precedent. Plaintiff and Settling Defendant agree that a condition precedent to the effectiveness of this agreement shall be that the Court shall determine that this agreement has been entered into in good faith. *[Plaintiff or Settling Defendant]* shall move the Court for such a determination within *[number]* days after execution of this agreement by all parties.

10. Advice of Attorney. Each party warrants and represents that in executing this agreement, _____ *[he or she]* has relied on legal advice from the attorney of _____ *[his or her]* choice, that the terms of this agreement and its consequences have been read and completely explained to *[him or her]* by that attorney, and that _____ *[he or she]* fully understands the terms of this agreement. Each party further acknowledges and represents that, in executing this release, _____ *[he or she]* has not relied on any inducements, promises, or representations made by the other party or any person representing or serving the other party.

11. Conditions of Execution. Each party acknowledges and warrants that _____ *[his or her]* execution of this release is free and voluntary.

12. Execution of Other Documents. Each party shall cooperate fully in the execution of any and all other documents and in any additional acts that may be necessary or appropriate to give full force and effect to the terms and intent of this agreement.

13. Attorneys' Fees. Each party shall bear all attorneys' fees and costs arising from that party's own counsel in

connection with the complaint, this agreement, the matters referred to herein, and all related matters. Except to the extent provided in Paragraph 7, this provision shall be applicable to this entire agreement.

14. Entire Agreement. This agreement contains the entire agreement between the parties.

15. Effective Date. This agreement shall become effective immediately on execution by the parties.

16. Governing Law. This agreement is entered into, and shall be construed and interpreted, in accordance with the laws of the State of California.

Executed _____ [date] at _____ [city], California.

PLAINTIFF

_____ [signature of plaintiff]

_____ [typed name]

SETTLING DEFENDANT

_____ [signature of settling defendant]

_____ [typed name]

Legal Topics:

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

Civil Procedure Settlements Settlement Agreements General Overview Civil Procedure Settlements Settlement Agreements Incorporation in Judgments Contracts Law Types of Contracts Settlement Agreements



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DIVISION V: CONTRACTS AND OBLIGATIONS

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3. Compromise and Settlement Agreements

27-77 California Legal Forms--Transaction Guide § 77.264

§ 77.264 Notice--Sliding Scale Settlement Agreement**[1] Comment--Use of Form**

The form in [2], below, is a notice of intent to enter into a sliding scale settlement agreement between one or more plaintiffs and fewer than all defendants. Such an agreement limits the liability of the settling defendants to an amount that depends on the amount of the plaintiff's recovery from defendants who are not parties to the agreement [*Code Civ. Proc.* § 877.5(b)]. For a sliding scale settlement agreement to be effective, a notice of intent must be served on all defendants who are not to sign the agreement. Service must be effected at least 72 hours before the agreement is entered into, although a court may allow a shorter time [*Code Civ. Proc.* § 877.5(c)].

For further discussion of sliding scale settlement agreements, see § 77.263[1].

[2] FORM**Notice--Sliding Scale Settlement Agreement**

NOTICE OF SLIDING SCALE SETTLEMENT AGREEMENT

_____ [*caption of action*]

To: _____ [*names of nonsettling defendants*]

PLEASE TAKE NOTICE that on _____ [*date*], Plaintiff and _____ [*name of settling defendant*], Defendant, will enter into a sliding scale settlement agreement. Under the terms of the agreement, the liability of _____ [*name of settling defendant*] to the Plaintiff will be limited to an amount that will depend on the amount that Plaintiff recovers from Defendants who are not parties to the agreement.

Dated: _____

Attorney for Plaintiff

[signature]

Legal Topics:

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

Civil ProcedureSettlementsSettlement AgreementsGeneral OverviewContracts LawTypes of ContractsSettlement Agreements



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3. Compromise and Settlement Agreements

27-77 California Legal Forms--Transaction Guide §§ 77.265-77.269

[Reserved]

§§ 77.265[Reserved]



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4. Ancillary Documents

27-77 California Legal Forms--Transaction Guide § 77.270

§ 77.270 Letter Authorizing Attorney to Settle

[1] Comment

[a] Use of Form

The forms in [2], *below*, are alternative letters with respect to an attorney's authority to compromise and settle a client's claim. The first alternative, in [2][a], *below*, is a letter from the client to the attorney authorizing the attorney to take all actions necessary to settle the case within specified parameters [see [b], *below*]. The second alternative, in [2][b], *below*, is a letter from the attorney to the client requesting authority to engage in settlement negotiations designed to produce a settlement within a specified range, with space for the client's authorization [see [c], *below*].

[b] Authority From Client To Bind Client to Settlement

An attorney must obtain specific authorization from the client before taking any action that will bind the client to a settlement. The fact that the attorney is employed by the client does not mean that the attorney has any implied or ostensible authority to bind the client to a compromise settlement of pending litigation [*Linsk v. Linsk* (1969) 70 Cal. 2d 272, 278, 74 Cal. Rptr. 544, 449 P.2d 760 ; *Bice v. Stevens* (1958) 160 Cal. App. 2d 222, 231-232, 325 P.2d 244 ; *Anderson v. Joseph* (1956) 146 Cal. App. 2d 450, 454, 303 P.2d 1053] . Moreover, an attorney has no authority to enter a dismissal with prejudice pursuant to an unauthorized settlement [*Robinson v. Hiles* (1953) 119 Cal. App. 2d 666, 672, 260 P.2d 194] .

It is presumed that attorneys have authority for acts done on behalf of their clients, but that presumption merely creates an issue of fact as against an affidavit or other competent evidence that an attorney had no such authority [*Anderson v. Joseph* (1956) 146 Cal. App. 2d 450, 454, 303 P.2d 1053 ; see *Phelps v. Kozakar* (1983) 146 Cal. App. 3d 1078, 1082-1083, 194 Cal. Rptr. 872 (absent competent evidence regarding attorney's lack of authority, client could not repudiate settlement when attorney orally represented to parties at mandatory settlement conference that he had authority from absent client to stipulate to judgment in accordance with previously negotiated settlement)].

While a client can be found to have ratified an unauthorized settlement [*Navrides v. Zurich Ins. Co. (1971) 5 Cal. 3d 698, 703-705, 97 Cal. Rptr. 309, 488 P.2d 637*], an attorney who settles a client's case without specific authority from the client may be disciplined, even if the settlement was fair and the client suffered no damage. These considerations do not excuse the attorney's wrongful conduct [*Trousil v. State Bar (1985) 38 Cal. 3d 337, 342, 211 Cal. Rptr. 525, 695 P.2d 1066*] .

[c] Authority From Client To Conduct Settlement Negotiations

While the case law prohibits attorneys from binding their clients to settlements without express authority to do so, this prohibition does not extend to merely engaging in settlement negotiations designed to produce a settlement proposal that can be presented to the client for final approval. Thus, prior written authority to engage in settlement negotiations is not mandatory, and often this is simply a matter that is discussed orally between attorney and client. Even in this situation, however, many attorneys still prefer to obtain written authorization to engage in negotiations designed to produce a settlement at a particular figure. One reason is that it prevents misunderstandings and bad feelings between the attorney and his or her own client, as well as embarrassment to the attorney, that can occur if the client rejects a settlement that has been negotiated by the attorney in the belief that it is in accordance with the client's wishes.

[d] Attorney's Duty to Communicate Settlement Offers

When an opposing party makes a written offer to settle, the plaintiff's attorney must promptly communicate the amount, terms, and conditions of the offer to the plaintiff [*Cal. Rules Prof. Conduct, Rule 5-105*]. An attorney who fails to communicate with the client during the course of the representation and then settles the client's case without specific authority from the client may be disciplined for wrongful conduct [*Trousil v. State Bar (1985) 38 Cal. 3d 337, 340, 342, 211 Cal. Rptr. 525, 695 P.2d 1066*] .

[e] Drafting Considerations

An authorization for settlement should be as comprehensive and precise as possible. It should spell out the disputed facts that the attorney is authorized to settle on the client's behalf. It should also specify the minimum conditions or amount that will be acceptable to the client as full settlement of the dispute.

[2] FORMs

[a] Letter From Client

Letter From Client

Re: _____ [style of case]

Dear _____:

I acknowledge that I have been fully advised by you of the various alternatives available to me with respect to the above matter. I further acknowledge that I have been fully advised by you with respect to the legal significance of a compromise and settlement of that matter.

Having been so advised, and knowing the significance of this act, I hereby authorize you to take all actions necessary to settle on my behalf all disputes, claims, and causes of action that I and _____ [name of adversary party] may have against each other in the above matter, provided that the settlement amounts to or provides for at least _____ [specify minimum terms, e.g., the payment of \$_____ or specify desired performance] by [the other party or me]. I further acknowledge that acceptance by you of the minimum [amount or performance] specified above shall constitute acceptable consideration for full settlement of the above matter.

 _____ [signature of client]
 _____ [typed name and address]

[b] Letter From Attorney

Letter From Attorney

Re: _____ [style of case]
 Dear _____:

I have completed an evaluation of your [claim or dispute] in the above matter and now ask for your authorization to conduct settlement negotiations with the attorney representing _____ [name of adverse party], in accordance with the following general terms. [specify terms, either monetary settlement or other desired performance].

These general terms constitute the minimum that you have previously indicated you would accept and the minimum that I would accept on your behalf. I will, of course, negotiate for more advantageous terms.

During the course of any negotiations with the attorney representing _____ [name of adverse party], I will keep you informed of the progress. I will also contact you immediately if a settlement that meets the terms stated above is offered. Any settlement that I negotiate under the authority granted in this letter will be subject to your final approval.

If the terms of the above authorization are acceptable to you, please sign and date this letter in the space provided below my signature, and return the signed copy to me.

 _____ [signature of attorney]
 _____ [typed name]

AUTHORIZATION

I authorize _____ [name of attorney] to negotiate for settlement of my case in accordance with the terms specified in this letter.

Signed _____ [date] at _____ [city], California.

 _____ [signature of client]
 _____ [typed name]

Legal Topics:

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

Civil Procedure Settlements Settlement Agreements General Overview Civil Procedure Settlements Settlement Agreements Effects Contracts Law Types of Contracts Settlement Agreements



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27-77 California Legal Forms--Transaction Guide § 77.271

§ 77.271 Unilateral Rescission--Release or Settlement Agreement Obtained Through Mistake, Fraud, Undue Influence, or Coercion

[1] Comment

[a] Use of Form

The form in [2], *below*, is a notice of unilateral rescission of a release or settlement agreement. An obligee may use this form to notify the obligor that the release is being rescinded because the obligee was mistaken, defrauded, unduly influenced, or coerced into signing it.

This form may be used if rescission is appropriate [*see [b], below*], regardless of whether the release arose out of a contract, tort, or will dispute. For discussion of the requirements for rescission in general, *see* § 77.340[1].

This form should not be used if the obligee seeks merely to avoid application of the release to a particular claim [*see [c], below*].

[b] Rescission of Release

A release is a contract and is subject to rescission for the same reasons as other contracts [*Matthews v. A.T. & S.F. Ry.* (1942) 54 Cal. App. 2d 549, 557, 129 P.2d 435] . A party to a contract may rescind it if his or her consent was given by mistake or was obtained through duress, menace, fraud, or undue influence, exercised by or with the connivance of the other party [Civ. Code § 1689(b)(1)]. For discussion of these grounds, *see* §§ 77.350[1], 77.351[1], 77.352[1], and 77.353[1]. For discussion of rescission, *see* § 77.22.

[c] Avoidance of Release

In certain circumstances, a release can be avoided as to particular claims without effecting a rescission. The release is not wholly invalidated in such a situation; rather, it is binding only to the extent actually intended by the obligee. A

release can be avoided as to unknown claims in certain circumstances [see [d], below]. It may also be avoided if the obligee was under a misapprehension that did not arise out of his or her own neglect as to the nature or scope of the release and the misapprehension was induced by the obligor's misconduct [see [e], below]. When the obligee seeks to avoid the effect of a release, it is unnecessary to effect a rescission, and no question of notice to rescind or restoration of consideration received arises [*Casey v. Proctor* (1963) 59 Cal. 2d 97, 103, 28 Cal. Rptr. 307, 378 P.2d 579] .

[d] Release of Unknown Claims

A general release does not cover claims that the obligee does not either know or suspect to exist in his or her favor at the time the release is executed, when those claims, if known by the obligee, would have materially affected the settlement with the obligor [Civ. Code § 1542]. Although the statute does not prevent all settlements for unknown claims, in order to apply a release to unknown claims, it must be shown, apart from the words of the release, that there was an intent to include those claims [*Casey v. Proctor* (1963) 59 Cal. 2d 97, 109, 28 Cal. Rptr. 307, 378 P.2d 579] .

Whether one consciously intended to release unknown claims is a question of fact [*Commercial Ins. Co. v. Copeland* (1967) 248 Cal. App. 2d 561, 56 Cal. Rptr. 794 ; *Carmichael v. Industrial Acc. Comm.* (1965) 234 Cal. App. 2d 311, 44 Cal. Rptr. 470] and depends on whether the release was knowingly made [*Casey v. Proctor* (1963) 59 Cal. 2d 97, 113, 28 Cal. Rptr. 307, 378 P.2d 579] .

The courts will look to a number of factors to determine whether there is substantial evidence that a release of unknown claims was knowingly made. These include a comparison of the amount of consideration received with the risk of the existence of unknown claims, the presence of bargaining and negotiation leading to the settlement, and the closeness of the issue of liability. In personal injury cases, other factors are whether the subject of personal injuries was discussed and the reasonableness of the contention that the injuries were in fact unknown when the release was executed [*Casey v. Proctor* (1963) 59 Cal. 2d 97, 113, 28 Cal. Rptr. 307, 378 P.2d 579] .

[e] Nonnegligent Misapprehension as Ground for Avoidance

If an obligee was under a misapprehension that did not arise out of his or her own neglect as to the nature or scope of the release, and the misapprehension was induced by the obligor's misconduct, the release is binding only to the extent actually intended by the obligee. Thus, fraud, misrepresentation of the contents of the release, deception, overreaching, or other unfair conduct on the part of the obligor have all been held to justify avoidance of a release. Avoidance, not rescission, is the result when the obligee can successfully allege nonnegligent misapprehension; it is unnecessary to effect a rescission, and no question of notice to rescind or restoration of consideration received arises [*Casey v. Proctor* (1963) 59 Cal. 2d 97, 103, 28 Cal. Rptr. 307, 378 P.2d 579] .

The obligee's misapprehension is not the result of his or her own neglect when he or she was not able to read the release, or when it was presented to and signed by the obligee during a funeral. The same holds true when the release was presented within a few hours after an accident while the obligee was still nervous and upset, while the obligee was still in the hospital suffering from injuries sustained in the accident, or while still confined to bed as a result of the accident, but not in the hospital [*Casey v. Proctor* (1963) 59 Cal. 2d 97, 103, 28 Cal. Rptr. 307, 378 P.2d 579] .

[2] FORM

Unilateral Rescission--Release or Settlement Agreement Obtained Through Mistake, Fraud, Undue Influence, or Coercion

NOTICE OF RESCISSION

To: _____[name of obligor]

Re: [style of case]

1. Rescission. The undersigned, _____ [name of rescinding party], hereby rescinds the release dated _____ [date], pursuant to which _____ [he or she] _____ [describe effect of release, e.g., released _____ (name of obligor) from all liability arising out of _____ (specify incident from which liability arose)] in the above-referenced case.

2. Ground for Rescission. [specify; see §§ 77.350-77.356 for provisions listing possible grounds].

3. Restoration of Consideration. _____ [specify disposition of consideration, e.g., I am returning the sum of \$_____].

_____ [signature of obligee]

_____ [typed name]

Legal Topics:

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

Civil Procedure Settlements Settlement Agreements General Overview Civil Procedure Settlement Agreements Rescission Contracts Law Remedies Rescission & Redhibition General Overview Contracts Law Types of Contracts Releases Contracts Law Types of Contracts Settlement Agreements



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27-77 California Legal Forms--Transaction Guide §§ 77.272-77.279

[Reserved]

§§ 77.272[Reserved]



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27-77 California Legal Forms--Transaction Guide § 77.280

§ 77.280 Novation Agreement--New Obligation Between Same Parties

[1] Comment

[a] Use of Form

The form in [2], *below*, is a novation agreement under which the parties to a contract may end their obligations under the contract and substitute new obligations between themselves [*see Civ. Code § 1531(1)*]. While the form is drafted in terms of a debtor-creditor relationship, it can be modified to cover some other contractual relationship by using different terms.

For a novation agreement substituting a new obligor in place of the original one [*see Civ. Code § 1531(2)*], see § 77.281[2]. For a novation agreement substituting a new obligee in place of the original one (when there is intent to transfer the rights of the original to the new obligee) [*see Civ. Code § 1531(3)*], see § 77.282[2].

[b] Elements of Novation

Novation is the substitution of a new obligation (or new obligor, or new obligee) for an existing one [*see Civ. Code § 1530*]. There are four essential elements to a novation [*U.S. Gypsum Co. v. Snyder-Ashe Co. (1934) 139 Cal. App. 731, 733, 34 P.2d 767*] :

- An existing valid obligation.
- The agreement of all parties to make the new contract.
- The extinguishment of the old contract.
- A valid new contract.

Generally, in order to have a novation between the same parties, in which there is a substitution of a new obligation,

there must be an intent to extinguish the old obligation [*Civ. Code* § 1531(1); see, e.g., *Paykar Construction, Inc. v. Spilat Construction Corp.* (2001) 92 Cal. App. 4th 488, 494, 111 Cal. Rptr. 2d 863 (no evidence that subcontractor who settled with property owners and accepted promissory note in lieu of original debt also intended to substitute note for general contractor's obligation to subcontractor)]. In addition, all parties affected by the novation must agree to it [*Garthofner v. Edmonds* (1946) 74 Cal. App. 2d 15, 20, 167 P.2d 789] .

The act of novation is made by contract and is thus subject to the rules governing contracts in general [*Civ. Code* § 1532]. These include requirements for a lawful object, competent parties, their consent (a meeting of the minds), and consideration [*Civ. Code* § 1550]. For discussion of these requirements, see § 77.20.

[c] Legal Effect

In general, when it can be shown that a new agreement was intended by the parties to take the place of an existing one, the preexisting one is extinguished. The result is a novation, and the rights and duties of the parties are governed by the new agreement alone. Failure to perform under the new agreement does not revive the old agreement [*Alexander v. Angel* (1951) 37 Cal. 2d 856, 862, 236 P.2d 561] .

[2] FORM

Novation Agreement--New Obligation Between Same Parties

NOVATION AGREEMENT

_____[name of debtor], _____[address], hereinafter referred to as Debtor, and
 _____[name of creditor], _____[address], hereinafter referred to as Creditor, in
 consideration of the promises made herein, agree as follows:

1. Original Agreement. On _____[date], Debtor and Creditor entered into an agreement under which [describe agreement, e.g., Creditor agreed to sell and Debtor agreed to purchase Blackacre for \$5,000, with payment to be made by Debtor within 30 days or, if agreement cannot be described succinctly, attach copy and explain].

2. Novation. Debtor and Creditor agree to extinguish the original agreement referred to in Paragraph 1. Each party hereby relinquishes any claim that _____[he or she] had or may have had under that original agreement and stipulates that this agreement constitutes a novation with respect to the original agreement.

3. New Agreement. Debtor and Creditor agree to replace the original agreement with the following new agreement: _____[describe new agreement, e.g., Creditor shall sell Greenacre to Debtor for \$2,000 and a 10-year term in Whiteacre pursuant to a new agreement dated _____(date), a copy of which is attached]. Both parties agree that all contract rights between them will henceforth flow from the new agreement alone and that the new agreement is not merely a supplement to or alteration of the original agreement referred to in Paragraph 1 but is rather a complete replacement for it.

Executed _____[date] at _____[city], California.

CREDITOR

_____[signature of creditor]
 _____[typed name]

DEBTOR

_____[signature of debtor]
 _____[typed name]

Legal Topics:

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

Contracts LawPerformanceGeneral OverviewContracts LawPerformanceNovation



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27-77 California Legal Forms--Transaction Guide § 77.281

§ 77.281 Novation Agreement--New Obligor

[1] Comment

[a] Use of Form

The form in [2], *below*, is a novation agreement substituting a new obligor for the original obligor and evidencing the obligee's intent to release the original obligor from his or her obligation [*see Civ. Code § 1531(2)*]. It is intended for use when an obligor desires to be relieved of his or her contract obligations by substituting a third party who is willing to take the obligor's place, and the obligee is willing to release the original obligor from his or her obligation. While the form is drafted in terms of a debtor-creditor relationship, it can be modified to cover some other contractual relationship by using different terms.

Other types of novation involve substitution of obligations between the same parties [*see Civ. Code § 1531(1); § 77.280*] or the substitution of a new obligee in place of the original one (when there is intent to transfer the rights of the original to the new obligee) [*see Civ. Code § 1531(3); § 77.282*].

For discussion of the elements of a novation, see § 77.280[1][b].

[b] Statutory Right to Rescind

When the obligee accepts the obligation of a new obligor in satisfaction of the original obligation, the obligee may rescind that acceptance if the original obligor prevents the new obligor from complying with his or her obligation or if the new obligor is insolvent at the time the obligee receives the new obligation, and the obligee is unaware of that fact. The obligee may also rescind his or her acceptance if the new obligor becomes insolvent before the obligee, acting with reasonable diligence, can present his or her claim against the new obligor [*Civ. Code § 1533*].

[2] FORM

Novation Agreement--New Obligor

NOVATION AGREEMENT

_____[*name of original obligor*], _____[*address*], hereinafter referred to as Original Debtor, and _____[*name of new obligor*], _____[*address*], hereinafter referred to as New Debtor, and _____[*name of obligee*], _____[*address*], hereinafter referred to as Creditor, in consideration of the promises made herein, agree as follows.

1. Original Agreement. On _____[*date*], Original Debtor and Creditor entered into an agreement under which [*describe agreement, e.g., Creditor was to build a swimming pool for Original Debtor, who was to pay Creditor \$2,000 within 30 days after completion or, if agreement cannot be described succinctly, attach copy and explain*].

2. Current Status. Since Original Debtor and Creditor entered into the agreement referred to in Paragraph 1, [*describe current situation between parties, e.g., the swimming pool has been completed, but Original Debtor still owes Creditor the \$2,000 referred to in Paragraph 1, and meanwhile, Original Debtor has sold the property to New Debtor*].

3. Novation. Original Debtor and Creditor agree to substitute New Debtor in place of Original Debtor with respect to the obligation described in Paragraph 1. New Debtor promises and agrees to perform the obligation described in Paragraph 1. Creditor agrees to and does hereby release and discharge Original Debtor from the obligation described in Paragraph 1.

4. Finality of Substitution. The substitution made by this agreement shall be final, except as otherwise provided by law.

Executed _____[*date*] at _____[*city*], California.

CREDITOR

_____[*signature of obligee*]
 _____[*typed name*]

ORIGINAL DEBTOR

_____[*signature of original obligor*]
 _____[*typed name*]

NEW DEBTOR

_____[*signature of new obligor*]
 _____[*typed name*]

Legal Topics:

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

Contracts LawPerformanceGeneral OverviewContracts LawPerformanceNovation



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27-77 California Legal Forms--Transaction Guide § 77.282

§ 77.282 Novation Agreement--New Obligee**[1] Comment--Use of Form**

The form in [2], below, is a novation agreement for use when a new obligee is substituted in the place of the original obligee with intent on the part of the original obligee to transfer his or her rights to the new obligee [see Civ. Code § 1531(3)]. The form can be used instead of a mere assignment when the original obligee desires to extinguish the obligor's obligation to him or her and vice versa. While the form is drafted in terms of a debtor-creditor relationship, it can be modified to cover some other contractual relationship by using different terms.

Other types of novation involve substitution of obligations between the same parties [see Civ. Code § 1531(1); § 77.280] or the substitution of a new obligor in place of the original one when there is intent to release the original obligor from his or her obligation [see Civ. Code § 1531(2); § 77.281].

For discussion of the elements of a novation, see § 77.280[1][b].

[2] FORM**Novation Agreement--New Obligee**

NOVATION AGREEMENT

_____[name of obligor], _____[address], hereinafter referred to as Debtor, and
 _____[name of original obligee], _____[address], hereinafter referred to as Original
 Creditor, and _____[name of new obligee], _____[address], hereinafter referred to as
 New Creditor, in consideration of the promises made herein, agree as follows.

1. Original Agreement. On _____[date], Debtor and Original Creditor entered into an agreement that obligated Debtor to [describe obligation or performance due] to Original Creditor. That obligation remains due from Debtor to Original Creditor.

2. Novation. The parties agree to substitute New Creditor in place of Original Creditor with respect to the obligation described in Paragraph 1. Debtor promises and agrees to render the performance described in Paragraph 1 to New Creditor rather than to Original Creditor. The parties agree to transfer all rights of Original Creditor with respect to the obligation described in Paragraph 1 from Original Creditor to New Creditor.

3. Discharge of Original Obligation. Original Creditor hereby discharges Debtor from Debtor's obligation to Original Creditor under the agreement referred to in Paragraph 1. The parties agree that this agreement supersedes the agreement referred to in Paragraph 1 and that all rights thereunder are extinguished.

Executed _____ [date] at _____ [city], California.

ORIGINAL CREDITOR

_____ [signature of original obligee]
_____ [typed name]

DEBTOR

_____ [signature of obligor]
_____ [typed name]

NEW CREDITOR

_____ [signature of new obligee]
_____ [typed name]

Legal Topics:

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

Contracts Law Debtor & Creditor Relations Contracts Law Performance Novation



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27-77 California Legal Forms--Transaction Guide §§ 77.283-77.289

[Reserved]

§§ 77.283[Reserved]



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E. Account Stated

1. Statement of Account

27-77 California Legal Forms--Transaction Guide § 77.290

§ 77.290 Statement of Account

[1] Comment

[a] Use of Form

The form in [2], *below*, may be used by a creditor to create an account stated. It is a letter stating the balance that the creditor claims is due, with a demand for payment. (In lieu of a letter, the creditor could use a standard invoice itemizing the items of the account and stating a total amount due.) In addition, the form lays a foundation for the debtor's implicit assent to the amount stated, by requesting the debtor to contact the creditor if the balance indicated does not agree with the debtor's records. For language to use in obtaining the debtor's express acceptance of the account stated, see § 77.291[2].

When the debtor needs a receipt for payment in full of the account stated, a notation on the reverse of his or her check can be used. Receipt provisions for this purpose are *set forth in § 77.300[2]*. If, on the other hand, the debtor intends to disapprove an account stated, he or she should use a provision *set forth in § 77.310[2]*.

[b] Reasons for Use

An account stated is an agreement, based on prior transactions between the parties, that all items of the account are true and that the balance struck is due and owing from one party to the other [*Trafton v. Youngblood* (1968) 69 Cal. 2d 17, 25, 69 Cal. Rptr. 568, 442 P.2d 648] . Thus, an account stated is used to establish an agreement between the parties that a certain sum will be paid and, if paid, will be accepted in discharge of an obligation [*Withers v. Matthews* (1961) 192 Cal. App. 2d 139, 141, 13 Cal. Rptr. 165] .

An account stated that has been assented-to by the debtor is a new contract between the parties to pay the amount expressly or implicitly agreed-on [*Shapiro v. Equitable Life Assur. Soc.* (1946) 76 Cal. App. 2d 75, 90, 172 P.2d 725] . An action on an account stated is not on the original transaction but is on the new contract [*Fogarty v. McGuire* (1959) 170 Cal. App. 2d 405, 409, 338 P.2d 992] .

A reason for using the account stated is to extend the period during which a creditor may sue for recovery of the amount owed. An action may be brought to recover under an account stated within four years after the account is stated in writing. The acknowledgment of the account stated need not be in writing in order for the four-year limitation period to apply [*Code Civ. Proc. § 337(2)*].

[c] Essential Elements In General

The essential elements of an account stated are:

- Previous transactions between the parties establishing the relationship of debtor and creditor.
- An agreement between the parties, express or implied, on the amount due from the debtor to the creditor.
- A promise by the debtor, express or implied, to pay the amount due [*Zinn v. Fred R. Bright Co.* (1969) 271 Cal. App. 2d 597, 600, 76 Cal. Rptr. 663] .

An account stated may be created between a debtor and a creditor by either party's sending the other a statement that reflects the current state of their account and the amount of the indebtedness claimed to be due [*see Shapiro v. Equitable Life Assur. Soc.* (1946) 76 Cal. App. 2d 75, 90, 172 P.2d 725] .

[d] Assent by Debtor

If the recipient of a statement of account either expressly or implicitly assents to the statement, an account stated results [*Shapiro v. Equitable Life Assur. Soc.* (1946) 76 Cal. App. 2d 75, 90, 172 P.2d 725] . An acknowledgment form is not essential; any evidence indicating assent by a debtor to the creditor that a stated amount is due is sufficient to imply a promise by the debtor to pay the stated amount [*Jeanese, Inc. v. Surety Title & Gty. Co.* (1959) 176 Cal. App. 2d 449, 456, 1 Cal. Rptr. 752] .

[e] Drafting Considerations

Although no particular form is required to create an account stated, the drafter can minimize future disputes by including in the statement of account such relevant information as the names and addresses of the debtor and creditor, a description of the items included in the account, and the amount claimed to be due. In addition, the statement of account should either lay the foundation for demonstrating the debtor's implied assent to the correctness of the amount due or ask the debtor to sign an acknowledgment form and return it to the creditor to indicate agreement to the amount stated [*see § 77.291[2]*].

[2] FORM

Statement of Account

Re: Account Number _____
Dear _____ [*name of debtor*]:

The present balance that you owe on the above account [for _____ (*generally describe underlying transaction, e.g., goods delivered and received*)] is \$_____. Please remit payment promptly. If the balance indicated does not agree with your records, please contact me at once.

_____ *[signature of creditor]*
_____ *[typed name]*

Legal Topics:

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

Contracts LawDebtor & Creditor RelationsContracts LawTypes of ContractsGeneral Overview



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DIVISION V: CONTRACTS AND OBLIGATIONS

CHAPTER 77 DISCHARGE OF OBLIGATIONS

PART IV. FORMS

E. Account Stated

1. Statement of Account

27-77 California Legal Forms--Transaction Guide § 77.291

§ 77.291 Statement of Account--Written Acceptance by Debtor

[1] Comment--Use of Form

The form in [2], below, sets forth alternative provisions that a creditor may use to obtain the debtor's written acceptance of a statement of account, thus creating an account stated. One of these alternate provisions may be used in the statement of account set forth in § 77.290[2] or may be adapted for use in the statement of account actually used in the transaction.

For further discussion of account stated, see § 77.290[1].

[2] FORM

Statement of Account--Written Acceptance by Debtor

EXPRESS APPROVAL OF STATEMENT

[EITHER, to request debtor to mail express approval of account stated:]

If the balance indicated above is in agreement with your records, please sign the enclosed copy of this statement and return it in the enclosed envelope provided for your convenience.

[OR, to obtain statement of approval of statement of account and promise to pay promptly:]

If the above balance is correct, please sign the following account stated and return it in the envelope provided. If the balance is for any reason incorrect, please inform us promptly.

_____ [date]

_____ [name of creditor]
_____ [address of creditor]

I have examined your statement of account dated _____ [date of statement] and find the balance of \$ _____ [amount specified in statement of account] to be a correct statement of the balance due under our agreement dated _____ concerning [specify nature of agreement], and I agree to pay the same promptly.

_____ [signature of debtor]
_____ [typed name of debtor]

[OR, to obtain debtor's assent, for use with any statement of account:]

_____ [date]

_____ [name of debtor] hereby approves the statement of account rendered above and acknowledges it to be a correct statement of the outstanding balance presently due and owing to _____ [name of creditor].

_____ [signature of debtor]
_____ [typed name of debtor]

Legal Topics:

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

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CHAPTER 77 DISCHARGE OF OBLIGATIONS

PART IV. FORMS

E. Account Stated

1. Statement of Account

27-77 California Legal Forms--Transaction Guide §§ 77.292-77.299

[Reserved]

§§ 77.292[Reserved]



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PART IV. FORMS

E. Account Stated

2. Receipt for Payment Under Account Stated

27-77 California Legal Forms--Transaction Guide § 77.300

§ 77.300 Statement of Account--Receipt on Debtor's Check

[1] Comment--Use of Form

The form in [2], below, sets forth two alternative types of receipt that a debtor may place on the reverse of the check that he or she uses to pay the amount specified in a statement of account, in order to obtain the creditor's acknowledgment that the sum demanded has been paid. A debtor has a right to require a receipt for any property delivered to the creditor in performance of his or her obligation [*Civ. Code § 1499*].

This form is only a receipt and is for use only when the full amount demanded by the creditor is agreed to and paid. For a check endorsement to use when the amount is disputed and the debtor desires to pay less than the amount demanded in accord and satisfaction, see § 77.230[2]. For other forms to use in tendering performance, see §§ 77.200-77.213.

Full performance of an obligation by a debtor (or any other person on the debtor's behalf and with the debtor's consent) extinguishes the obligation if it is accepted by the creditor [*Civ. Code § 1473*]. Thus, the provision in this form is phrased as a receipt by the payee (the creditor) of payment in full of the creditor's statement of account.

[2] FORM

Statement of Account--Receipt on Debtor's Check

[EITHER, to refer to all items specified on statement of account:]

Endorsement of this check by the payee acknowledges receipt of full payment for all of the items listed in payee's statement of account dated _____.

[OR, to refer to statement of account by its invoice number:]

Endorsement of this check by the payee constitutes full receipt of full payment of the amount stated on the payee's invoice number _____, dated _____.

Legal Topics:

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

Contracts LawDebtor & Creditor RelationsContracts LawTypes of ContractsGeneral Overview



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E. Account Stated

2. Receipt for Payment Under Account Stated

27-77 California Legal Forms--Transaction Guide §§ 77.301-77.309

[Reserved]

§§ 77.301[Reserved]



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E. Account Stated

3. Objection to Account Stated

27-77 California Legal Forms--Transaction Guide § 77.310

§ 77.310 Statement of Account--Debtor's Objection

[1] Comment--Use of Form

The form in [2], below, is a debtor's objection to a creditor's statement of account. It illustrates the manner in which an incorrect or disputed statement of account should be answered, in order to prevent any inference that the debtor has agreed to the statement of account and that an account stated has been formed. For discussion of the elements essential to the formation of an account stated, see § 77.290[1][c].

If the debtor disputes the creditor's statement of account and intends to offer an accord and satisfaction, the *form in § 77.220[2] or § 77.221[2]* may be used instead of (or in addition to) this form. If the debtor intends to offer part performance in discharge of an undisputed obligation, see § 77.222.

This form should not be used if the account involved is a consumer credit card account subject to the fair credit billing provisions of the Truth in Lending Act [see 15 U.S.C. § 1666] and the California Song-Beverly Credit Card Act [Civ. Code § 1747 *et seq.*]. Instead, the cardholder should send a notice of billing error complying with the applicable requirements of those statutes and the implementing regulations. For forms and further discussion, see Ch. 46, *Credit Card and Other Open-End Credit Transactions*.

[2] FORM

Statement of Account--Debtor's Objection

Re: Account Number _____

Dear _____ [name of creditor]:

[EITHER, to disagree with entire balance stated by creditor:]

The balance shown in your statement dated _____ [date] covering the above account is incorrect. According to my records, the balance should be \$ _____. Please check your records and send a corrected statement as soon as possible.

[OR, to disagree with individual item or component of balance:]

Your statement for the above account dated _____ [date] shows _____ [state disputed item or component of balance, e.g., the imposition of a service charge in the amount of \$ _____ for the previous month]. According to my records, this item is in error because [specify reason, e.g., I paid the prior month's bill on time]. Thus, the balance for the account should be \$ _____. Please send a corrected statement as soon as possible.

[CONTINUE]

_____ [signature of debtor]
_____ [typed name]

Legal Topics:

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

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E. Account Stated

3. Objection to Account Stated

27-77 California Legal Forms--Transaction Guide §§ 77.311-77.319

[Reserved]

§§ 77.311[Reserved]



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CHAPTER 77 DISCHARGE OF OBLIGATIONS

PART IV. FORMS

F. Modification of Contract

27-77 California Legal Forms--Transaction Guide § 77.320

§ 77.320 Modification of Written Contract

[1] Comment

[a] Use of Form

The form in [2], *below*, is an agreement between the parties to an existing written contract, to modify that contract. It can be used either to change some of the original contract terms or to add new terms. For an example of an agreement continuing one party's employment by the other party under a prior contract incorporated by reference, and stating agreed-on modifications, see Ch. 85, *Employment Contracts*.

If the existing contract provides for modification on the occurrence of specified events and pursuant to a designated procedure, the modification agreement *set forth in* § 77.321[2] should be used instead of this one. If the existing contract permits one party to make a unilateral modification on notice to the other party, the notice *set forth in* § 77.322[2] should be used.

If the modifications desired by the parties are so extensive that they require a complete redrafting of the contract, it should be rescinded [*see* § 77.340[2]] or canceled [*see* § 77.370[2]]. For discussion of the difference between rescission and cancellation, see § 77.22[6].

[b] Definition of Modification

A modification is an agreement by the parties to an existing contract, altering their obligations without deleting any of the elements essential to the validity of the original contract [*Carlson, Collins, Gordon & Bold v. Banducci* (1967) 257 Cal. App. 2d 212, 223, 64 Cal. Rptr. 915]. A later alteration of the details of a contract that leaves its general purpose undisturbed is a modification rather than a rescission [*Travelers Ins. Co. v. Workmen's Comp. App. Bd.* (1967) 68 Cal. 2d 7, 17, 64 Cal. Rptr. 440, 434 P.2d 992 (oral agreement)].

[c] Requirements for Modification in General

A modification of a contract must meet the basic definitional requirements noted in [b], *above*. In other words, it must be mutually agreed-on and must alter the obligations of the parties without deleting any of the elements essential to the validity of the original contract [*Carlson, Collins, Gordon & Bold v. Banducci* (1967) 257 Cal. App. 2d 212, 223, 64 Cal. Rptr. 915 ; see § 77.21[5]].

A modification of a written contract may be written, in which case the modification must also be a contract [Civ. Code § 1698(a)], or may be oral [Civ. Code § 1698(b), (c); see § 77.21[3]]. If the modification is in writing, it must be supported by consideration [*Fairlane Estates v. Carrico Constr. Co.* (1964) 228 Cal. App. 2d 65, 71, 39 Cal. Rptr. 35 ; see § 77.21[4]].

[d] Contract for Sale of Goods

A contract for the sale of goods is subject to Division 2 of the California Commercial Code [Com. Code § 2102], which imposes substantially different requirements for modification. Of principal relevance to this form is the rule that an agreement modifying a sale-of-goods contract needs no consideration [Com. Code § 2209(1)]. For further discussion, see § 77.21[4] and Ch. 52, *Sales of Goods Under the Uniform Commercial Code* .

[2] FORM

Modification of Written Contract

MODIFICATION AGREEMENT

_____[name of party], _____[address], and _____[name of party],
_____[address], agree as follows.

1. Relationship of Parties. The parties agree that the provisions of that certain contract between them, dated _____[date], pursuant to which [describe relationship existing between parties], hereinafter referred to as the "original contract," shall continue in effect except as modified in Paragraph 2. A copy of the original contract is attached.

[EITHER, to describe modification:]

2. Modification. The parties agree to modify [reference to part of original contract, e.g., Paragraph 3.01] of the original contract so that _____[describe modification, e.g., in addition to the services described therein, _____(name) shall _____(describe additional performance), in return for which _____(name) shall pay _____(name) the sum of \$_____].

[OR, to restate changed provision of original contract:]

2. Modification. In consideration of [specify consideration], the parties agree to modify [reference to part of original contract, e.g., Paragraph 3.01] of the original contract to read as follows:

"Section 3.01. [set forth amended provision of original contract]."

[CONTINUE]

3. Construction. In the event of any conflict or inconsistency between the provisions of this modification agreement

and the original contract, the provisions of this modification agreement shall control in all respects.

Executed _____[*date*] at _____[*city*], California.

[*signature of first party*]

[*typed name*]

[*signature of second party*]

[*typed name*]

Legal Topics:

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

Contracts LawContract ModificationsGeneral Overview



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PART IV. FORMS

F. Modification of Contract

27-77 California Legal Forms--Transaction Guide § 77.321

§ 77.321 Mutual Modification Pursuant to Terms of Original Written Contract

[1] Comment

[a] Use of Form

The form in [2], *below*, is an agreement by the parties to a written contract, modifying that contract as permitted by and in accordance with its terms. This form can be used, for example, to modify a contract that provides for an adjustment on the occurrence of a specified event but postpones determination of the exact terms of the adjustment until that event occurs (such as a contract providing that the price will be reevaluated in case of increased labor costs). In such a case, the parties would negotiate the adjustment on occurrence of that event and reduce any resulting agreement to writing using this form.

If the original contract provides for a predetermined (specific) adjustment on the occurrence of a specified event, then the adjustment can be acted on unilaterally [*see* § 77.322[2]].

For discussion applicable to modification agreements generally, see § 77.320[1].

[b] Requirements for Modification

In general, a modification of a written contract may be written, in which case the modification must also be a contract [*Civ. Code* § 1698(a)], or may be oral [*Civ. Code* § 1698(b), (c); *see* § 77.320[1][c]]. Although a written modification would not be required when a written contract expressly permits oral modification, a written modification is always recommended in order to minimize the risk of later disagreement over its terms.

[2] FORM

Mutual Modification Pursuant to Terms of Original Written Contract

MODIFICATION AGREEMENT

_____[*name of party*], _____[*address*], and _____[*name of party*],
 _____[*address*], agree as follows.

1. Original Contract. The parties to this agreement are also parties to that certain agreement [*describe, e.g., dated July 12, 1970, and entitled "Construction Contract"*], which is attached.

2. Modification Permitted by Original Contract. Paragraph [*number or other reference*] of the contract referred to in Paragraph 1 above provides [*specify authority to modify, e.g., for the modification of the contract price in the event that certain specific conditions arise or are found to exist in excavating the foundation*]. _____[*state event triggering modification, e.g., One of those conditions was the presence of solid rock, and, on _____*
 (*date*), solid rock in large quantity was discovered in the area to be excavated].

3. Modification. Accordingly, the parties agree that the contract referred to in Paragraph 1 above is modified by amending Paragraph [*number or other reference, e.g., 3.01*] of that contract to read as follows:

"Paragraph 3.01. [*set forth amended provision of original contract*]."

4. Construction. In the event of any conflict or inconsistency between the provisions of this agreement and the original contract, the provisions of this agreement shall control in all respects.

Executed _____[*date*] at _____[*city*], California.

_____[*signature of first party*]
 _____[*typed name*]
 _____[*signature of second party*]
 _____[*typed name*]

Legal Topics:

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

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CHAPTER 77 DISCHARGE OF OBLIGATIONS

PART IV. FORMS

F. Modification of Contract

*27-77 California Legal Forms--Transaction Guide § 77.322***§ 77.322 Notice of Unilateral Modification****[1] Comment--Use of Form**

The form in [2], below, is a notice by one party to a contract that the obligations of one or both of the parties are modified pursuant to a term in the contract authorizing one party to impose such a modification unilaterally on the occurrence of a specified event. This form (1) notifies the other party that an event triggering the right to impose a unilateral modification has occurred, (2) sets forth the contract provision as modified, and (3) states that the agreed-on modification is now in force. It should be used, even if the other party knows that the event has occurred, to make a record that fact and the ensuing modification. This form may be used, for example, in the case of a contract that provides for a price increase if labor costs rise by a certain factor, computed according to a predetermined formula. If labor costs subsequently rise, the contractor should notify the customer in writing of the nature of the increased cost of labor and its corresponding effect on the contract price.

For discussion of the requirements for modification generally, see § 77.321[1][b].

[2] FORM**Notice of Unilateral Modification**

Dear _____ [name of other party]:

Pursuant to Paragraph [specify] of the contract between us dated _____, relating to _____ [summarize subject matter of contract, e.g., the painting of the exterior surfaces of the apartment building located at 99760 Main Street, Fairfield, California], [describe contents or effect of modification clause, e.g., the contract price is to be increased by _____ percent for every _____ percent in increase in the union wage scale for painters].

You are hereby notified that on _____ [date], union wages for painters increased by

_____ percent]. Accordingly, [*specify effect, e.g., the new contract price for the job is*
\$_____ *or the contract price applicable to work performed on and after that date shall increase by*
_____ (*specify percentage, lump sum amount, or amount per unit*)].

_____ [*signature of notifying party*]
_____ [*typed name*]

Legal Topics:

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

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CHAPTER 77 DISCHARGE OF OBLIGATIONS

PART IV. FORMS

F. Modification of Contract

27-77 California Legal Forms--Transaction Guide § 77.323

§ 77.323 Written Modification of Oral Contract

[1] Comment--Use of Form

The form in [2], below, is a written agreement modifying an oral contract. When an oral contract is modified in writing, there is no need for consideration and the oral contract is extinguished to the extent of the new written modification [Civ. Code § 1697]. For further discussion of modification, see § 77.320[1].

[2] FORM

Written Modification of Oral Contract

MODIFICATION AGREEMENT

_____[name of party], _____[address], and _____[name of party],
 _____[address], agree to modify the oral agreement made between them on
 _____[date], under which [state terms of oral agreement or summarize its subject matter], as follows:
 [state new terms or changed terms of original oral contract].

Executed _____[date] at _____[city], California.

_____[signature of first party]
 _____[typed name]
 _____[signature of second party]
 _____[typed name]

Legal Topics:

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

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F. Modification of Contract

27-77 California Legal Forms--Transaction Guide §§ 77.324-77.329

[Reserved]

§§ 77.324[Reserved]



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DIVISION V: CONTRACTS AND OBLIGATIONS

CHAPTER 77 DISCHARGE OF OBLIGATIONS

PART IV. FORMS

G. Rescission

1. Mutual Rescission

27-77 California Legal Forms--Transaction Guide § 77.330

§ 77.330 Rescission by Mutual Consent

[1] Comment

[a] Use of Form

The form in [2], below, is an agreement under which all parties to a contract agree to rescind and thus extinguish it [Civ. Code § 1688] and restore the parties to the position they were in when the contract was made [*Mamula v. McCulloch* (1969) 275 Cal. App. 2d 184, 197, 79 Cal. Rptr. 571] . A contract can be rescinded if all parties to it consent to the rescission [Civ. Code § 1689(a)].

A mutual rescission of a sale-of-goods contract [Com. Code § 2750] is set forth in Ch. 52, *Sales of Goods Under the Uniform Commercial Code* .

[b] Rescission Distinguished From Cancellation

Although rescission is sometimes referred to as, or confused with, cancellation, they are not the same [*Pico Citizens Bank v. Tafco, Inc.* (1962) 201 Cal. App. 2d 131, 136, 19 Cal. Rptr. 905] . To cancel a contract means to abrogate all of it that remains unperformed, while rescission means restoration of the parties to their former positions. In other words, cancellation refers to the state of things at the time of cancellation; rescission refers to the state of things existing when the contract was made [*Mamula v. McCulloch* (1969) 275 Cal. App. 2d 184, 197, 79 Cal. Rptr. 571] .

[c] Rescission by Mutual Consent

A rescission by mutual consent of all parties may be accomplished at any stage in the duration of a contract [*Griffin v. Beresa* (1956) 143 Cal. App. 2d 299, 301, 300 P.2d 31] . The consent of the parties need not be in writing but may be oral or manifested by conduct [*Treadwell v. Nickel* (1924) 194 Cal. 243, 258-259, 228 P. 25] . Since a writing makes the intent of the parties unambiguous, a written rescission is desirable in order to minimize the risk of later disagreement.

A rescission clause is also desirable in a contract in which the parties intend to supersede a previous agreement. While an inconsistent contract will provide an implied rescission, if the new contract has the same legal effect and differs only in terms, the two instruments will be construed together [*Thomson v. Leak* (1933) 135 Cal. App. 544, 549, 27 P.2d 795] . The use of a definite rescission clause avoids such a result by making the intent of the parties clear.

[d] Consideration Based on Relinquishment of Rights

Consideration in a rescission by mutual consent is provided by the mutual promises to forgo the rights and benefits provided under the contract [*Sass v. Hank* (1951) 108 Cal. App. 2d 207, 215, 238 P.2d 652] .

[e] Effect of Rescission on Third-Party Beneficiary

A third-party beneficiary to a contract may enforce his or her rights under the contract at any time before the contracting parties rescind the contract [Civ. Code § 1559]. In other words, the contracting parties are free to rescind the agreement without the consent of the third-party beneficiary until he or she acts to enforce the rights conferred on him or her by the contract; but rescission deprives the third party of any rights under the contract [*Riley v. Riley* (1953) 118 Cal. App. 2d 11, 15, 256 P.2d 1056] .

[2] FORM

Rescission by Mutual Consent

RESCISSION AGREEMENT

_____[name of party], _____[address], and _____[name of party],
_____[address], agree as follows.

1. Consent to Rescission. The parties hereby consent and agree to rescind that certain contract between them, dated _____[date], [describe contract by its title, contents, purpose, or effect]. A copy of that contract is attached.

2. Disposition of Consideration Received. [provide for return, retention, or some other disposition of consideration].

3. Surrender of Rights. The parties mutually agree to forgo all other rights and benefits provided for under the contract referred to in Paragraph 1 as consideration for the rescission of that contract.

Executed _____[date] at _____[city], California.

_____[signature of first party]
_____[typed name]
_____[signature of second party]
_____[typed name]

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts Law Remedies Rescission & Redhibition General Overview



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G. Rescission

1. Mutual Rescission

27-77 California Legal Forms--Transaction Guide §§ 77.331-77.339

[Reserved]

§§ 77.331[Reserved]



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CHAPTER 77 DISCHARGE OF OBLIGATIONS

PART IV. FORMS

G. Rescission

2. Unilateral Rescission

27-77 California Legal Forms--Transaction Guide § 77.340

§ 77.340 Notice of Unilateral Rescission

[1] Comment

[a] Use of Form

The form in [2], *below*, is a notice of unilateral rescission. It is intended for use by one party to a contract who wishes to extinguish that contract, terminate his or her obligations under it, and be restored to his or her precontract position. In order to do this without the consent of the other contracting parties [*see* § 77.330[2] (mutual rescission)], the party must have a legal ground for rescission [*Civ. Code* § 1689(b); *see* [b], *below*].

Notice of rescission may also be accomplished by service of a pleading in an action for rescission [*Civ. Code* § 1691; *see* *Civ. Code* § 1693 (effect of delay in giving notice)]. For a form for such a pleading, and related discussion, see California Forms of Pleading and Practice, Ch. 490, *Rescission and Restitution* (Matthew Bender).

[b] Statement of Grounds for Rescission; Statutory Grounds

This form contains a paragraph in which the person giving notice is to state the ground for rescission. For individual clauses stating the common statutory grounds [*see* *Civ. Code* § 1689(b); § 77.22[2]], which may be inserted into that paragraph, and discussion of those grounds, see §§ 77.350-77.357.

[c] Home Solicitation Contract

A home solicitation contract [*see* *Civ. Code* § 1689.5(a)] generally may be rescinded by the buyer until midnight of the third business day after the day he or she signed it [*see* *Civ. Code* § 1689.6]. For discussion of this type of contract and the buyer's right to cancel it, see Ch. 89, *Home Improvement and Specialty Contracts*.

[d] Sale of Residence in Foreclosure

Contracts under which a person acquires title to any residence in foreclosure [see *Civ. Code* § 1695.1] are subject to rescission by the seller [*Civ. Code* § 1695.4(a)]. For discussion of this type of contract, and the seller's right to rescind or cancel it, see Ch. 23, *Agreements to Sell Real Property*.

[e] Credit Transaction With Security Interest in Dwelling

If a credit transaction provides for the retention of a security interest in a consumer's principal dwelling, the consumer may rescind it at any time up to midnight of the third business day after consummation of the transaction [15 U.S.C. § 1635(a); see *Beach v. Ocwen Federal Bank* (1998) 523 U.S. 410, 416-418, 118 S. Ct. 1408, 140 L. Ed. 2d 566 (examining expiration of right to rescind pursuant to 15 U.S.C. § 1635(f))]. For discussion, see Ch. 25, *Real Estate Loans*.

[f] Requirement of Promptness

The rescinding party must meet two requirements promptly after discovering the facts that provide a ground for rescission. First, he or she must give notice to the other contracting parties of an intent to rescind [*Civ. Code* § 1691(a)]. Second, he or she must restore or at least offer to restore, to its original owner, all consideration received under the contract to the date of rescission [*Civ. Code* § 1691(b)].

The offer to restore consideration may be conditioned on the return of any consideration given up by the rescinding party. The offer to restore need not be made if the other parties are unable or positively refuse to restore the rescinding party's consideration [*Civ. Code* § 1691(b)].

The rationale for promptness in tendering a notice of rescission is that allowing a party to take a wait-and-see attitude once he or she discovers a ground for rescission would allow that party an unfair advantage [see *Sogg v. Harvey* (1955) 134 Cal. App. 2d 116, 121, 285 P.2d 104].

[g] Exceptions to Promptness Requirement

Before filing an action, the requirement of prompt notice and tender of consideration is excused if the rescinding party was subject to duress, menace, undue influence, or disability. In addition, a party must be aware of the right to rescind before failure to give prompt notice or offer to restore can bar the rescission [*Civ. Code* § 1691]. After filing an action, relief will not be denied because of a delay in giving notice of intent to rescind unless the delay has substantially injured the other contracting parties [*Civ. Code* § 1693; see also *Saret-Cook v. Gilbert, Kelly, Crowley & Jennett* (1999) 74 Cal. App. 4th 1211, 1227, 88 Cal. Rptr. 2d 732 (delay in giving notice of rescission resulted in substantial prejudice to employer); *Wilke v. Coinway, Inc.* (1967) 257 Cal. App. 2d 126, 140, 64 Cal. Rptr. 845].

[h] Relief Based on Rescission

When a contract has been rescinded, any party to the contract may seek relief based on the rescission either by suing to recover whatever is owing as a consequence of the rescission or for any other relief to which he or she is entitled in the circumstances or by asserting the rescission as a defense or in a cross-complaint. A claim for damages is not inconsistent with a claim for relief based on rescission. The aggrieved party will be awarded complete relief, including restitution of benefits conferred by him or her in the transaction. An action for consequential damages is an appropriate remedy and is not only consistent with rescission but also permitted by law in such cases. However, the relief granted may not include duplicate or inconsistent items of recovery [*Civ. Code* § 1692].

If the owner of real property is fraudulently induced to convey that property, when the fraud is discovered and the original owner rescinds the contract, he or she may also sue for damages for loss of use of the property and, at the discretion of the trier of fact, be granted punitive damages [*Millar v. James* (1967) 254 Cal. App. 2d 530, 533, 62 Cal. Rptr. 335]. The award of consequential damages may also include, at the court's discretion, reasonable attorneys' fees [

Kass v. Weber (1968) 261 Cal. App. 2d 417, 423, 67 Cal. Rptr. 876]. However, the party may not recover the value of the property based on an affirmation of the contract, as would be possible in an action in deceit, if he or she also recovers the property as a result of the rescission [*Paularena v. Superior Court* (1965) 231 Cal. App. 2d 906, 915, 42 Cal. Rptr. 366] .

[i] Damages for Breach of Sale-of-Goods Contract

If the contract deals with the sale of goods, the Commercial Code specifically provides that damages for an antecedent breach are not foreclosed by rescission of the contract [*Com. Code* § 2720].

[j] Severability of Contract With Respect to Rescission

As a general rule, a contract cannot be partly rescinded. The reason is that it is considered unfair for a party to rescind those portions that he or she finds disadvantageous while retaining those rights that he or she desires to have. However, a contract may be divisible; that is, if the consideration is apportioned, corresponding to divisions of the contract (for instance, a construction contract covering two buildings, with payments of \$100,000 for one and \$250,000 for the other), then any severable portion may be rescinded while the rest remains intact [*Simmons v. California Institute of Technology* (1949) 34 Cal. 2d 264, 275, 209 P.2d 581] .

[2] FORM

Notice of Unilateral Rescission

NOTICE OF RESCISSION

_____ [date]

To: [name of other contracting party]

TAKE NOTICE that I hereby rescind the contract [describe contract by title, parties, or contents, or refer to copy attached to notice], dated _____.

The ground for rescission of the contract is [specify; see §§ 77.350-77.357] .

_____ [specify disposition of consideration, e.g., I am returning the sum of \$ _____, which has been advanced to me or I offer to return all consideration that has been tendered to me, on condition that all consideration that I have given you, namely _____ (specify), be returned in substantially the same condition as when given. Should this consideration be damaged when returned to me, I reserve the right to reimbursement for the damage from the consideration I now hold].

_____ [signature of rescinding party]

_____ [typed name]

Legal Topics:

For related research and practice materials, see the following legal topics:
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CHAPTER 77 DISCHARGE OF OBLIGATIONS

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G. Rescission

2. Unilateral Rescission

27-77 California Legal Forms--Transaction Guide §§ 77.341-77.349

[Reserved]

§§ 77.341[Reserved]



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DIVISION V: CONTRACTS AND OBLIGATIONS

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G. Rescission

3. Grounds for Unilateral Rescission

27-77 California Legal Forms--Transaction Guide § 77.350

§ 77.350 Clause--Mistake as Ground for Rescission

[1] Comment

[a] Use of Form

The form in [2], *below*, contains alternative clauses for use in stating mistake as a ground for unilateral rescission and describing the mistake involved. These alternatives are intended for use as part of a notice of rescission [see § 77.340[2]]. For discussion of rescission in general, see § 77.340[1]. For clauses stating and describing other grounds for rescission, see §§ 77.351-77.356.

[b] Mistake as Ground for Rescission

The consent of contracting parties must be free, otherwise the contract will be voidable and subject to rescission [Civ. Code §§ 1565, 1566]. Consent of a party is not free when given by mistake or as a result of duress, menace, fraud, or undue influence [Civ. Code § 1567]. When the consent of a party was given by mistake, the contract is subject to rescission by that party or any party jointly contracting with him or her [Civ. Code § 1689(b)(1)]. Consent will be deemed to have been given by mistake only if it could not have been obtained in the absence of the mistake [Civ. Code § 1568].

[c] Requirement That Mistake Be Material

A mistake may be of fact or of law [Civ. Code § 1576], and either kind of mistake may be a ground for rescission of a contract [*Harris v. Rudin, Richman & Appel* (2002) 95 Cal. App. 4th 1332, 1339, 116 Cal. Rptr. 2d 552 (reversing summary judgment for plaintiff because defendants raised triable issues of fact as to whether they were entitled to rescind settlement agreement based on mutual mistake of fact or law); *Crocker-Anglo Nat. Bank v. Kuchman* (1964) 224 Cal. App. 2d 490, 496, 36 Cal. Rptr. 806] . However, whether of fact or of law, the mistake must affect the execution and material elements of the contract (and not merely some collateral matter), or it will not provide adequate ground for rescission [*Bellwood Discount Corp. v. Empire Steel Buildings Co.* (1959) 175 Cal. App. 2d 432, 435, 346

P.2d 467] .

[d] Mistake of Fact

A mistake of fact may be either unawareness (unconscious ignorance or forgetfulness) of a fact that is material to the contract or belief in a material fact that is not actually true [see *Civ. Code* § 1577; see also *Donovan v. RRL Corp.* (2001) 26 Cal. 4th 261, 278-279, 109 Cal. Rptr. 2d 807, 27 P.3d 702 (auto dealership's lack of knowledge regarding typographical error in advertised price of car constituted mistake of fact)]. In either case, a mistake of fact must be proved by the party claiming it [*Megee v. Fasulis* (1943) 57 Cal. App. 2d 275, 285, 134 P.2d 815] .

A mistake of fact need not be mutual in order to constitute a ground for rescission [*Civ. Code* § 1689(b)(1); *Moore v. Copp* (1897) 119 Cal. 429, 436, 51 P. 630 ; *Mitidiere v. Saito* (1966) 246 Cal. App. 2d 535, 537-538, 54 Cal. Rptr. 665] . For example, if the party against whom rescission is sought receives notice of the mistake before entering into the agreement, the unilateral nature of the mistake will not bar rescission [*M.F. Kemper Construction Co. v. City of Los Angeles* (1951) 37 Cal. 2d 696, 702-703, 235 P.2d 7] .

If a plaintiff has no reason to know of and does not cause the defendant's unilateral mistake of fact, the defendant must establish the following facts to obtain rescission of the contract [*Donovan v. RRL Corp.* (2001) 26 Cal. 4th 261, 282, 109 Cal. Rptr. 2d 807, 27 P.3d 702 (auto dealership's lack of knowledge regarding typographical error in advertised price of car constituted mistake of fact; rescission was warranted because evidence established that unilateral mistake of fact was made in good faith, defendant did not bear risk of mistake, and enforcement of contract with erroneous price would be unconscionable)]:

- The defendant made a mistake regarding a basic assumption upon which the defendant made the contract;
- The mistake has a material effect upon the agreed exchange of performances that is adverse to the defendant;
- The defendant does not bear the risk of the mistake; and
- The effect of the mistake is such that the enforcement of the contract would be unconscionable.

If the mistake was the result of neglect of a legal duty by one of the parties, that party will not be able to rescind the contract [*Civ. Code* § 1577; see *Mesmer v. White* (1953) 121 Cal. App. 2d 665, 674, 264 P.2d 60] . In determining whether a party will be denied rescission on the ground that the mistake was caused by his or her neglect of a legal duty, ordinary negligence will not be considered such a neglect [*Donovan v. RRL Corp.* (2001) 26 Cal. 4th 261, 283-284, 109 Cal. Rptr. 2d 807, 27 P.3d 702 ; *Van Meter v. Bent Construction Co.* (1956) 46 Cal. 2d 588, 595, 297 P.2d 644 ; *Harris v. Rudin, Richman & Appel* (2002) 95 Cal. App. 4th 1332, 1339, 116 Cal. Rptr. 2d 552 (even assuming party to lawsuit had duty to monitor all legislative bills introduced during pendency of lawsuit, to ascertain if any affected merits of claim or defense, breach of that duty would be only ordinary negligence which would not preclude rescission)]. For example, a contractor will not be denied rescission simply because he or she neglected to check the bid for clerical errors [see *Elsinore Union etc. Sch. Dist. v. Kastorff* (1960) 54 Cal. 2d 380, 382, 6 Cal. Rptr. 1, 353 P.2d 713] .

An example of a mistake as to which the party seeking rescission bears the risk would arise in the case of a life-annuity contract that the buyer wants to rescind because, at the time of making the contract, the buyer was ignorant of a condition leading inexorably to an unexpectedly early death. Each party to a life-annuity contract bears the risk of the uncertainty of life expectancy: the buyer assumes the risk of early death in order to get the reward of longevity, while the seller takes the opposite position. The buyer's ignorance might be a mistake, but if so, it is one as to which the buyer bears the risk, and therefore rescission is not available to the buyer on that ground [*Grenall v. United of Omaha Life*

Ins. Co. (2008) 165 Cal. App. 4th 188, 193-196, 80 Cal. Rptr. 3d 609] .

[e] Mistake of Law

A mistake of law will be a ground for rescission only in two situations [*Civ. Code* § 1578]. First, if all parties mutually misconceive the law's demands on a particular material point, the mistake will make the contract voidable [*Civ. Code* §§ 1566, 1567, 1578(1); see, e.g., *Harris v. Rudin, Richman & Appel* (2002) 95 Cal. App. 4th 1332, 1339, 116 Cal. Rptr. 2d 552 (reversing summary judgment for plaintiff because defendants raised triable issues of fact as to whether they were entitled to rescind settlement agreement based on mutual mistake regarding version of Probate Code section applicable to malpractice action)]. Second, if only one party makes the mistake, the contract will still be voidable if the other parties were aware of the misconception but did nothing to correct it [*Civ. Code* § 1578(2)]. In California, this second rule is applied even if the rescinding party's attorney is the person who made the mistake of law [*Estate of Peterson* (1968) 259 Cal. App. 2d 492, 500, 66 Cal. Rptr. 629] .

[2] FORM

Clause--Mistake as Ground for Rescission

[EITHER]

The ground for rescission of the contract is that there was a mutual mistake of [fact or law]. Specifically, [specify, e.g., while both of us thought that the soil was sandy loam, in fact, the soil was hard pan, which is unsuitable without a great deal more expense].

[OR]

The ground for rescission of the contract is that [there was or I made] a unilateral mistake of fact. Specifically, [specify, e.g., in preparing my bid for the contract, the item "Fixtures" was priced at \$200 instead of \$2,000, as the result of a clerical error].

[OR]

The ground for rescission of the contract is that [there was or I made] a unilateral mistake of law. Specifically, _____[specify, e.g., I was unaware that the property had been zoned for rural use only, and you were aware that I was laboring under this misconception, yet you did nothing to rectify it].

Legal Topics:

For related research and practice materials, see the following legal topics:
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DIVISION V: CONTRACTS AND OBLIGATIONS

CHAPTER 77 DISCHARGE OF OBLIGATIONS

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G. Rescission

3. Grounds for Unilateral Rescission

27-77 California Legal Forms--Transaction Guide § 77.351

§ 77.351 Clause--Duress or Menace as Ground for Rescission

[1] Comment

[a] Use of Form

The form in [2], *below*, contains alternative clauses for use in stating duress or menace as a ground for unilateral rescission and describing the underlying facts. The appropriate alternative is intended for use as part of a notice of rescission [see § 77.340[2]]. For discussion of rescission in general, see § 77.340[1]. For clauses stating and describing other grounds for rescission, see §§ 77.350 and 77.352-77.356.

[b] Duress or Menace as Ground for Rescission

Duress and menace are both grounds for rescission of a contract [*Civ. Code § 1689(b)(1)*]. Duress and menace are both defined by statute [*Civ. Code §§ 1569, 1570*; see [c], [d], *below*], yet they are often confused, and the words have been used interchangeably [*Odorizzi v. Bloomfield School Dist.* (1966) 246 Cal. App. 2d 123, 128, 54 Cal. Rptr. 533] .

[c] Definition of Duress

Duress is the unlawful confinement of a party or that party's spouse, descendant, ancestor, or adopted child [*Civ. Code § 1569(1)*]. Duress may also be confinement of any such person in lawful form, but with an unlawful or fraudulent purpose [*Civ. Code § 1569(3)*]. Any such confinement may be classified as duress of the person [see *Sistrom v. Anderson* (1942) 51 Cal. App. 2d 213, 220, 124 P.2d 372] . Another form of duress is called duress of goods; it involves the unlawful detention of property belonging to any of the persons described above [*Civ. Code § 1569(2)*; see *Tarpy v. County of San Diego* (2003) 110 Cal. App. 4th 267, 276-279, 1 Cal. Rptr. 3d 607 (dog owner failed to raise triable issue of fact as to whether county's retention of dog was unlawful so as to establish statutory duress in signing release for neutering)].

[d] Definition of Menace

Menace involves a threat and therefore is technically distinguishable from duress, which involves direct action of confinement. There are three statutory forms of menace [Civ. Code § 1570]. The first consists of a threat of duress of the person [Civ. Code § 1570(1)]. The second, perhaps most commonly confused with duress, is a threat of unlawful and violent injury to the person or property of any person described in the section on duress [Civ. Code § 1570(2); see, e.g., *McIntosh v. McIntosh* (1962) 209 Cal. App. 2d 371, 373, 26 Cal. Rptr. 26]. The third type of menace consists of a threat of injury to the character of any of these persons [Civ. Code § 1570(3)]. Under modern law, threats to injure one's business have also been recognized as a form of duress or menace [*Leeper v. Beltrami* (1959) 53 Cal. 2d 195, 203, 1 Cal. Rptr. 12, 347 P.2d 12].

[e] Threat of Criminal Prosecution

A threat of criminal prosecution, made in order to compel a party to sign a contract, is considered menace, and if the threat appears to have been successful in suppressing the free consent necessary for a binding contract, the agreement is voidable [*Helmick v. Thomas* (1960) 187 Cal. App. 2d 395, 397, 9 Cal. Rptr. 512]. This principle is based on the theory that such a threat amounts to either a threat of unlawful confinement [Civ. Code § 1569(1), (3)] or a threat of character injury [Civ. Code § 1570(3)].

In either case, the principles applicable to the statutory forms of duress and menace are also applied in the delicate process of distinguishing between proper pursuit of legal remedies and improper use of the criminal law as a tool of coercion. It is clear that menace requires more than simple pursuit of legal remedies by attempting to institute criminal prosecution. If, because of such action, the accused party is moved to voluntarily make a contract with the other party in order to obviate the need for criminal prosecution, the contract will not be voidable on grounds of duress or menace [*Miller v. Walden* (1942) 53 Cal. App. 2d 353, 359-361, 127 P.2d 952]. On the other hand, even if one party has a clear case against the other, the threat of criminal prosecution may not be used as a club with which to beat down the other's free will because such a use of criminal law, even to enforce valid claims, is against public policy [*Shasta Water Co. v. Croke* (1954) 128 Cal. App. 2d 760, 764, 276 P.2d 88].

[f] Requirement of Unlawful Action

In general, a party may not rescind a contract on the ground of duress or menace if the party who exercised the compelling influence was acting within his or her legal rights [*Konecko v. Konecko* (1958) 164 Cal. App. 2d 249, 252, 330 P.2d 393]. Unlawful action ordinarily is a prerequisite to a claim of duress or menace. Thus, a party who contracts with another party who has threatened to sue him or her to enforce a legal obligation may not rescind the contract on the ground of duress or menace [*Del Carlo v. County of Sonoma* (1966) 245 Cal. App. 2d 36, 40, 53 Cal. Rptr. 771]. The threatened party also could not rescind the agreement on either ground if he or she had been induced to enter the agreement by the other party's refusal to carry out a previous agreement [*Nesbitt Fruit Products, Inc. v. Del Monte Beverage Co.* (1960) 177 Cal. App. 2d 353, 361, 2 Cal. Rptr. 333]. However, the other party must be acting in good faith in asserting his or her claim of right, whether it is the right to sue or the right to defend against suit [*Nesbitt Fruit Products, Inc. v. Del Monte Beverage Co.* (1960) 177 Cal. App. 2d 353, 361, 2 Cal. Rptr. 333]. If the other party acts in good faith, then the contract induced by the assertion of that claim will be upheld even if it later appears that the claim was without merit [*Nesbitt Fruit Products, Inc. v. Del Monte Beverage Co.* (1960) 177 Cal. App. 2d 353, 361, 2 Cal. Rptr. 333; see *London Homes, Inc. v. Korn* (1965) 234 Cal. App. 2d 233, 44 Cal. Rptr. 262 (business compulsion)].

It has been said that duress exists when a contract is obtained by so oppressing a person by threats regarding the safety or liberty of that person or a member of that person's family or his or her property, as to deprive him or her of the free exercise of will and prevent the meeting of minds necessary to a valid contract. For example, a court is not required to give legal recognition to a marital settlement agreement entered into by a wife who bargained away substantial property rights to protect her custody rights to her children, and who was without contractual volition in executing the marital settlement agreement because of her emotional state compounded by her husband's threatened use of a custody hearing

in the event that the wife did not execute the agreement [*In re Marriage of Gonzalez* (1976) 57 Cal. App. 3d 736, 743-745, 129 Cal. Rptr. 566] .

[g] Requirement of Intent

Closely allied with the requirement for an unlawful action and the key issue of good faith is the requirement that the party who induces the rescinding party to enter the contract must intend to rob that party of voluntary action by exerting unlawful pressure [*Goldstein v. Enoch* (1967) 248 Cal. App. 2d 891, 894-895, 57 Cal. Rptr. 19] . If one party merely suggests to the other that a certain occurrence may happen without threatening it in order to induce the other to act, and the other party then enters into a contract with the party who made the suggestion in anticipation of that occurrence, the party who contracted in anticipation of the occurrence may not later rescind on the ground of duress or menace [but see § 77.352[1] (undue influence)].

[h] Standard of Courage for Victim of Duress or Menace

Historically, rescission of an agreement on the ground of duress or menace could be achieved only if the threatened party showed a specified quantum of courage or resistance to the exerted influence [*Lewis v. Fahn* (1952) 113 Cal. App. 2d 95, 98, 247 P.2d 831] . Under modern law, the trier of fact determines whether the individual was coerced by the threat and thus forced into a detrimental agreement [*Balling v. Finch* (1962) 203 Cal. App. 2d 413, 419, 21 Cal. Rptr. 490] .

[i] Duress or Menace by Third Person

Successful rescission of a contract on the ground of duress or menace depends on the duress or menace having been exercised by, or with the connivance of, the party against whom rescission is sought [Civ. Code § 1689(b)(1)]. Thus, if one party is under duress by another, and is influenced to take action that gives a third person an enforceable right, the success of a later attempt by the victim of duress to rescind the contract will depend on whether the person who gained the enforceable right as a result of the duress was in connivance with the party who exerted the duress. The requirement has been interpreted to mean that if the person who gained the enforceable right knew of the duress and took advantage of it to obtain the influenced party's consent to the agreement, then the person who gained the enforceable right was in connivance with the party who exerted the duress, and the contract is voidable [*Leeper v. Beltrami* (1959) 53 Cal. 2d 195, 1 Cal. Rptr. 12, 347 P.2d 12] .

[j] Proof of Duress

If the ground for rescission is duress, the rescinding party must be prepared to establish the facts constituting duress by clear, cogent, and convincing evidence, irrespective of whether he or she brings an action to rescind or defends a suit to enforce the rescinded contract [*Stevenson v. Stevenson* (1940) 36 Cal. App. 2d 494, 500, 97 P.2d 982] . One aid to proving a case of duress is the fact that courts will take inadequate consideration as evidence of possible duress [*Leeper v. Beltrami* (1959) 53 Cal. 2d 195, 206, 1 Cal. Rptr. 12, 347 P.2d 12] .

[2] FORM

Clause--Duress or Menace as Ground for Rescission

[EITHER]

The ground for rescission of the contract is duress. Specifically, I would not have consented to the contract had you not [specify, e.g., held me in your office against my will until I agreed to the contract or arranged for my arrest on fraudulent grounds with the purpose of forcing me to consent to the contract].

[OR]

The ground for rescission of the contract is duress. Specifically, I would not have consented to the contract had not _____[*name*], with whom you were in connivance, [*specify, e.g., unlawfully detained my monthly supply of insulin with the intention of forcing me to consent to the contract*].

[OR]

The ground for rescission of the contract is menace. Specifically, I would not have signed the agreement had you not threatened to [*specify, e.g., unlawfully confine or cause the arrest of my son*].

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3. Grounds for Unilateral Rescission

27-77 California Legal Forms--Transaction Guide § 77.352

§ 77.352 Clause--Undue Influence as Ground for Rescission

[1] Comment

[a] Use of Form

The form in [2], *below*, contains alternative clauses for use in stating undue influence as a ground for unilateral rescission of a contract [*Civ. Code § 1689(b)(1)*] and describing the underlying facts. The appropriate alternative is intended for use as part of a notice of unilateral rescission [*see § 77.340[2]*]. For discussion of rescission in general, see § 77.340[1]. For clauses stating and describing other grounds for rescission, see §§ 77.350, 77.351 and 77.353-77.356.

[b] General Nature of Undue Influence

Undue influence is the legal term for the type of persuasion that overcomes the will without convincing the judgment. Like many legal concepts, it is found at some point in a spectrum of possible occurrences ranging from a legitimate attempt to persuade to a complete destruction of a subservient party's will. The legal problem is to define where any particular set of circumstances lies in this spectrum [*Odorizzi v. Bloomfield School Dist. (1966) 246 Cal. App. 2d 123, 130, 132, 54 Cal. Rptr. 533*] .

[c] Definition of Undue Influence; Domineering and Subservient Parties

Undue influence is the use, by a domineering party, of any authority he or she may have over a subservient party, or of any confidence that the subservient party has in the domineering party, in order to gain an unfair advantage over the subservient party [*see Civ. Code § 1575(1)*]. Undue influence may also occur if the domineering party takes unfair advantage of the subservient party's weakness of mind [*see Civ. Code § 1575(2)*] or takes a grossly oppressive and unfair advantage of the subservient party's necessities or distress [*see Civ. Code § 1575(3)*]. Since undue influence involves both a domineering party and a subservient party, it may occur either because the one is excessively strong or the other is very weak, or from some combination of the two factors [*Odorizzi v. Bloomfield School Dist. (1966) 246 Cal. App. 2d 123, 131-132, 54 Cal. Rptr. 533*] . However, a threat to enforce a legal right will not be classified as undue

influence [*Konecko v. Konecko* (1958) 164 Cal. App. 2d 249, 252, 330 P.2d 393 ; see § 77.351[1]].

[d] Elements of Undue Influence

Some of the elements that often accompany undue influence are [*Odorizzi v. Bloomfield School Dist.* (1966) 246 Cal. App. 2d 123, 133, 54 Cal. Rptr. 533] :

- Discussion of the transaction at an unusual or inappropriate time.
- Consummation of the transaction in an unusual place.
- Insistent demand that the business be finished at once.
- Extreme emphasis on untoward consequences of delay.
- Use of multiple persuaders by the domineering party against a single subservient party.
- Absence of independent advisers to the subservient party.
- Statements that there is no time to consult financial advisers or attorneys.

If a number of these elements are simultaneously present, the persuasion may be characterized as excessive [*Odorizzi v. Bloomfield School Dist.* (1966) 246 Cal. App. 2d 123, 133, 54 Cal. Rptr. 533] .

[e] Effect of Subservient Party's Weakness

When undue influence occurs almost exclusively because of the weakness of the subservient party, no confidential relationship exists, and the burden of proof of the undue influence falls on that party [*Dorn v. Pichinino* (1951) 105 Cal. App. 2d 796, 801-802, 234 P.2d 307] . This burden normally must be established by clear, satisfactory, and convincing evidence [*Pailhe v. Pailhe* (1952) 113 Cal. App. 2d 53, 62, 247 P.2d 838] . However, when a subservient party is obviously weak due to age or some disorder of the mind, nearly anyone who realizes that this weakness exists will be said to be in a confidential relationship with that person [see *Stenger v. Anderson* (1967) 66 Cal. 2d 970, 979-980, 59 Cal. Rptr. 844, 429 P.2d 164] .

[f] Presumptions of Undue Influence--Attorney-Client Relationship

A presumption of undue influence applies when an attorney and a client transact business, other than a contract for legal services, because the attorney-client relationship is one of strict fiduciary responsibility [*Bradner v. Vasquez* (1954) 43 Cal. 2d 147, 151, 272 P.2d 11] . This presumption has been based on fiduciary responsibility of the attorney and not on any confidential relationship [*Rader v. Thrasher* (1962) 57 Cal. 2d 244, 249, 18 Cal. Rptr. 736, 368 P.2d 360] . In one case involving an alleged oral joint venture agreement between an attorney and his client, in which the attorney brought an action for breach of that contract, the court held that the attorney's conduct violated *Cal. Rules Prof. Conduct, Rule 3-300* and also amounted to undue influence under *Prob. Code § 16004(c)*. The alleged agreement therefore was voidable, and once the client acted to void it, the trial court properly refused to enforce the agreement or to grant any other requested relief arising from the voided agreement [*BGJ Associates, LLC v. Wilson* (2003) 113 Cal. App. 4th 1217, 1221, 1226-1230, 7 Cal. Rptr. 3d 140 (also finding that client did not ratify voidable contract by his conduct)].

[g] Agent-Principal Relationship

The relationship of agent and principal gives rise to a presumption of undue influence when benefit is derived by the

agent in dealing with the principal [see *Webb v. Saunders* (1947) 79 Cal. App. 2d 863, 869-870, 181 P.2d 43 (gifts or benefits from principal to agent were presumptively void)].

[h] Domestic Relationship

The presumption of undue influence is applied in many cases of domestic and familial relationships when it appears that the trust reposed in the domineering party gave that party the ability to gain at the subservient party's expense [*Roeder v. Roeder* (1953) 118 Cal. App. 2d 572, 580, 258 P.2d 581 ; *Sparks v. Sparks* (1950) 101 Cal. App. 2d 129, 135, 225 P.2d 238] . Transactions between husband and wife are held to be between parties in a confidential relationship [*Fam. Code* § 721; see *Morris v. Berman* (1958) 159 Cal. App. 2d 770, 789, 324 P.2d 601] .

[i] Friendship

A friend who occupied a confidential or fiduciary relationship with the rescinding party may be found to have exercised undue influence [*Stenger v. Anderson* (1967) 66 Cal. 2d 970, 979-980, 59 Cal. Rptr. 844, 429 P.2d 164] . Aside from the appearance of confidence reposed in the domineering party, other elements that serve to create the presumption are advanced age or mental weakness of the subservient party and lack of independent advice [*Rosa v. Rosa* (1948) 87 Cal. App. 2d 427, 428-429, 197 P.2d 85] .

[j] Effect of Presumption

The presumption of undue influence has the general effect of reversing the burden of proof, so that the domineering party must prove that he or she dealt fairly and openly with the subservient party [*Bradner v. Vasquez* (1954) 43 Cal. 2d 147, 153, 272 P.2d 11] . This proof by the domineering party must also meet the standard of clear, satisfactory, and convincing evidence [*Estate of Phillipi* (1946) 76 Cal. App. 2d 100, 103, 172 P.2d 377] .

[k] Effect of Independent Advice on Presumption

Whether the subservient party obtained independent advice before entering the contract is an important factor in determining whether undue influence has robbed the subservient party of the free will needed to enter into a binding contract [see *Odorizzi v. Bloomfield School Dist.* (1966) 246 Cal. App. 2d 123, 133, 54 Cal. Rptr. 533] . However, independent advice is not necessarily a determinative factor in that it will not rebut the presumption in every case [*Wells Fargo Bank v. Brady* (1953) 116 Cal. App. 2d 381, 401, 254 P.2d 71] , nor will lack of it always foreclose rebuttal of the presumption by other evidence of fairness [*O'Neill v. Dennis* (1952) 109 Cal. App. 2d 210, 214, 240 P.2d 376] .

When a subservient party obtains independent advice, this is favorable evidence for the domineering party, but the court may decide to disregard it or give it little weight unless the advice was obtained from someone whom the subservient party has chosen. Independent advice is far better evidence for the domineering party if it is given in private and at a time when the subservient party is not surrounded by dominant influence [*Wells Fargo Bank v. Brady* (1953) 116 Cal. App. 2d 381, 401, 254 P.2d 71] .

[l] Other Evidence to Overcome Presumption

Other evidence of the fairness of a transaction will often overcome the presumption of undue influence. One example is evidence that the domineering party made a full disclosure of the other's rights under the agreement as well as disclosure of his or her own gain [*Gold v. Greenwald* (1966) 247 Cal. App. 2d 296, 306-307, 55 Cal. Rptr. 660] . If the domineering party can show that the subservient party initiated the transaction, this will be strong evidence in the domineering party's favor, since it will tend to show that the subservient party's will was being expressed in the transaction [*O'Neill v. Dennis* (1952) 109 Cal. App. 2d 210, 213, 240 P.2d 376] . If the subservient party is shown to have expressed the feeling that he or she placed no trust in the domineering party or that he or she was suspicious of the

domineering party's motives, this evidence will serve to show that the subservient party was on guard and was thus not likely to be subject to over-persuasion [*Barnes v. Dobbins* (1958) 159 Cal. App. 2d 737, 742-743, 324 P.2d 696] .

[m] Presumption of Violation of Trustee's Fiduciary Duties

A transaction between a trustee and a beneficiary that occurs during the existence of the trust or while the trustee's influence with the beneficiary remains and by which the trustee obtains an advantage from the beneficiary is presumed to be a violation of the trustee's fiduciary duties. This presumption is a presumption affecting the burden of proof. It does not apply to the provisions of an agreement relating to the hiring or compensation of the trustee [*Prob. Code* § 16004(c)].

[2] FORM

Clause--Undue Influence as Ground for Rescission

[EITHER]

The ground for rescission of the contract is that at the time the contract was made, I was unable to exercise my will freely because [*state reason that inhibited exercise of free will, e.g., of the shock I was experiencing after the death of my wife on the previous day*].

[OR]

The ground for rescission of the contract is that [*specify basis of claim, e.g., at the time the contract was made, you insisted on dealing with me at my home rather than waiting until I arrived at my office where I normally conduct the type of business involved in that contract*].

[OR]

The ground for rescission of the contract is that at the time the contract was made, you repeatedly emphasized that delay would produce dire consequences, in order to persuade me to sign the contract without enough time for careful consideration of the matter.

[OR]

The ground for rescission of the contract is that at the time the contract was made, there were several persons trying to convince me to agree to your contract.

[OR]

The ground for rescission of the contract is that at the time the contract was made, there was no one available whom I could ask for independent advice on the matter, and [*add qualification, e.g., you insisted that the matter was so urgent that there was no time for me to consult a _____ (specify type of advisor, e.g., legal or financial) expert for advice*].

[OR]

The ground for rescission of the contract is that at the time the contract was made, your position as [*specify, e.g., my attorney*] caused me to place my trust in you to such an extent that I could not and did not exercise independent judgment in selling you the property for what now appears to be a very low price.

Legal Topics:

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

Contracts Law Remedies Rescission & Redhibition General Overview



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DIVISION V: CONTRACTS AND OBLIGATIONS

CHAPTER 77 DISCHARGE OF OBLIGATIONS

PART IV. FORMS

G. Rescission

3. Grounds for Unilateral Rescission

27-77 California Legal Forms--Transaction Guide § 77.353

§ 77.353 Clause--Fraud as Ground for Rescission

[1] Comment

[a] Use of Form

The form in [2], below, sets forth alternative clauses for use in stating actual or constructive fraud [see *Civ. Code* § 1571] as a ground for unilateral rescission [*Civ. Code* § 1689(b)(1)] and describing the facts underlying the assertion of fraud. The appropriate alternative is intended for use as part of a notice of rescission [see § 77.340[2]]. For discussion of rescission in general, see § 77.340[1]. For clauses stating and describing other grounds for rescission, see §§ 77.350-77.352 and 77.354-77.356.

[b] Elements of Actual Fraud

Actual fraud consists of *any* of the following [*Civ. Code* § 1572]:

- The suggestion, as a fact, of that which is not true, by one who does not believe it to be true.
- The positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, even if that party believes it is true [see, e.g., *Anderson v. Deloitte & Touche* (1997) 56 Cal. App. 4th 1468, 1476-1477, 66 Cal. Rptr. 2d 512 (triable issues precluded summary judgment on negligent misrepresentation claim against accountants)].
- The suppression of that which is true by one having knowledge or belief of the fact.
- A promise made without any intention of performing it.
- Any other act to deceive.

In other words, actual fraud consists of the misrepresentation of a material fact that is made with intent to induce reliance in another and that does induce actual, justifiable, and detrimental action in reliance by the other party as a result of his or her belief in its truth. In general, the absence of any of these elements will preclude any form of recovery on the ground of fraud [*Goldstein v. Enoch* (1967) 248 Cal. App. 2d 891, 895, 57 Cal. Rptr. 19] .

[c] Misrepresentation of Material Fact

Misrepresentation, as applied to cases of actual fraud, is very loosely defined. It may be a positive assertion of a falsity, the suppression of a fact, a promise made with no intent to perform, or any other act which is fitted to deceive [see *Civ. Code* § 1572(15)]. The definition of fraud is open-ended in order that it may encompass all surprise, trick, cunning dissembling, and unfair ways by which another is deceived [*Wells v. Zenz* (1927) 83 Cal. App. 137, 140, 256 P. 484] .

[d] Effect of Knowledge

When a party makes a false statement that he or she knows to be false, and when the other elements of fraud are present, then the consent obtained thereby was not free and the contract is voidable [*Civ. Code* §§ 1565, 1566, 1572(1)]. A party's knowledge of the falsity of his or her representation is a sufficient condition for establishing the existence of fraud. However, knowledge is not necessary to establish fraud since the statutory definition of actual fraud specifically includes false positive assertions made by a party who believes them to be true but who has no reasonable basis for that belief [*Gagne v. Bertran* (1954) 43 Cal. 2d 481, 487, 275 P.2d 15 ; see *Civ. Code* § 1572(2); see also *Anderson v. Deloitte & Touche* (1997) 56 Cal. App. 4th 1468, 1476-1477, 66 Cal. Rptr. 2d 512 (negligent misrepresentation claim against accounting firm)].

[e] Actual and Justified Reliance

The rescinding party must be able to prove that he or she relied on the misrepresentation and that the reliance was justified [*Seeger v. Odell* (1941) 18 Cal. 2d 409, 414, 115 P.2d 977] . One will not be allowed to rescind on the ground of fraud if he or she relied on a mere statement of opinion. However, if the opinion or legal conclusion misrepresents material facts, then it will be treated as any other misrepresentation, and reliance will be justified [*Seeger v. Odell* (1941) 18 Cal. 2d 409, 414, 115 P.2d 977 ; but see § 77.350[1][e]]. If the person giving the opinion or legal conclusion represents himself or herself as an expert, or otherwise has superior knowledge of the subject, reliance is justified [*Pacesetter Homes, Inc. v. Brodtkin* (1970) 5 Cal. App. 3d 206, 213, 85 Cal. Rptr. 39 ; *Wilke v. Coinway, Inc.* (1967) 257 Cal. App. 2d 126, 136, 64 Cal. Rptr. 845] .

Reliance is unjustified when the rescinding party has reason to know that the misrepresentation is false. This occurs, for example, when he or she has made an independent investigation of the facts, which, if performed with reasonable care, should have disclosed the true situation [*Carroll v. Dungey* (1963) 223 Cal. App. 2d 247, 254, 35 Cal. Rptr. 681] . However, if the rescinding party makes the investigation as an amateur, and the falsity of the misrepresentation is not apparent without expert advice, his or her reliance on it will be justified [*Snelson v. Ondulando Highlands Corp.* (1970) 5 Cal. App. 3d 243, 252, 84 Cal. Rptr. 800] .

[f] Requirement of Damage

As a general rule, a party must suffer damage as a result of fraud in order to use it as a ground for rescission [*Darrow v. Houlihan* (1928) 205 Cal. 771, 774, 272 P. 1049] . However, it has been held that whenever a party does not receive exactly what he or she bargained for, as a result of fraud, he or she is damaged [*Earl v. Saks & Co.* (1951) 36 Cal. 2d 602, 612, 226 P.2d 340] .

The pecuniary value of damages need not be pleaded or proved in a fraud case [*Dunn v. Stringer* (1940) 41 Cal. App. 2d 638, 644-645, 107 P.2d 411] . Furthermore, the injury will be seen with respect to what the injured party bargained for or thought he or she was getting, and not what he or she actually paid [*Hefferan v. Freebairn* (1950) 34 Cal. 2d

715, 721, 214 P.2d 386] .

[g] Constructive Fraud

Constructive fraud consists of any breach of duty that, without an actually fraudulent intent, produces an advantage for the person at fault, or anyone claiming under that person, by misleading another to the prejudice of that other person or anyone claiming under that other person [Civ. Code § 1573(1)]. Constructive fraud also includes any other act or omission that the law specifically declares to be fraudulent [Civ. Code § 1573(2)]. Constructive fraud eliminates the requirement of intent to deceive or negligent deception and substitutes the requirement of breach of a legal duty arising out of a confidential relationship [*County of Santa Cruz v. McLeod* (1961) 189 Cal. App. 2d 222, 234, 11 Cal. Rptr. 249] . Constructive fraud will not be found in cases of innocent misrepresentation [*Crocker-Anglo Nat. Bank v. Kuchman* (1964) 224 Cal. App. 2d 490, 494-495, 36 Cal. Rptr. 806] .

Constructive fraud arises out of conduct that, while not actually fraudulent, ought to be so treated because it has all of the consequences and legal effects of actual fraud [*Estate of Arbuckle* (1950) 98 Cal. App. 2d 562, 568, 220 P.2d 950] . A party is guilty of constructive fraud when his or her actions produce an advantage for him or her over another party by misleading the other party to his or her detriment [Civ. Code § 1573(1)].

Constructive fraud occurs when a party breaches a duty owed to another by virtue of a confidential or fiduciary relationship [*Odorizzi v. Bloomfield School Dist.* (1966) 246 Cal. App. 2d 123, 129, 54 Cal. Rptr. 533] . Whenever a fiduciary or a person in a position of confidence gains an advantage over the party to whom the fiduciary duty is owed, the transaction is presumptively fraudulent, and the party who gained bears the burden of proving that it was fair and made in good faith [*Boyd v. Bevilacqua* (1966) 247 Cal. App. 2d 272, 290, 55 Cal. Rptr. 610 ; see § 77.352[1] (undue influence and types of confidential and fiduciary relationships)].

[h] Comparison of Fraud and Undue Influence

Fraud and undue influence are closely related and are often used as interchangeable terms [*Wells Fargo Bank v. Brady* (1953) 116 Cal. App. 2d 381, 400, 254 P.2d 71] . They are different in that undue influence may be exercised without making any false statement, while a party may deceive another into entering a contractual agreement without taking unfair advantage of either a confidential relationship, the other's weakness of mind, or the other's necessities or distress [see Civ. Code §§ 1572, 1573, 1575]. In general, fraud overcomes the will by deceit, while undue influence overcomes the will by importunity.

Constructive fraud and undue influence are extremely close to each other in that they are both most often found in connection with a fiduciary or confidential relationship. However, constructive fraud cannot be found when no confidential relationship exists, while undue influence can be found in the absence of such a relationship [see *Odorizzi v. Bloomfield School Dist.* (1966) 246 Cal. App. 2d 123, 130-133, 54 Cal. Rptr. 533] .

[i] Proof of Fraud

As a general rule, a party must prove fraud because the law presumes fair play [*Megee v. Fasulis* (1943) 57 Cal. App. 2d 275, 285, 134 P.2d 815] . The proof of fraud, as with duress, menace, and undue influence, must be clear and convincing [*Carroll v. Dungey* (1963) 223 Cal. App. 2d 247, 253, 35 Cal. Rptr. 681 ; *Maslow v. Maslow* (1953) 117 Cal. App. 2d 237, 243, 255 P.2d 65] .

Actual fraud is always a question of fact [Civ. Code § 1574] and may be proved by circumstantial evidence [*Friedberg v. Weissbuch* (1955) 135 Cal. App. 2d 750, 754, 287 P.2d 785] . Each element of actual fraud must be proved by clear and convincing evidence. In the case of constructive fraud, if the defrauded party can prove the existence of a fiduciary duty, a breach of that duty, and a consequent advantage to the other party, all by clear and convincing

evidence, the burden of proof of fairness is shifted to the other party [*Boyd v. Bevilacqua* (1966) 247 Cal. App. 2d 272, 290-291, 55 Cal. Rptr. 610] .

[j] Waiver of Consequences of Fraud

A contract clause that purports to exempt any party from responsibility for fraud is against public policy [Civ. Code § 1668; *Rothstein v. Janss Investment Corp.* (1941) 45 Cal. App. 2d 64, 72, 113 P.2d 465] . When a contract is procured by fraud, none of its provisions can be binding [*Vai v. Bank of America* (1961) 56 Cal. 2d 329, 344, 15 Cal. Rptr. 71, 364 P.2d 247] .

However, when an agent acts outside his or her authority, as specified by the contractual agreement between principal and agent, and in so acting defrauds another, the principal will not be held liable for damages resulting from the fraud [*Speck v. Wylie* (1934) 1 Cal. 2d 625, 628, 36 P.2d 618] . A principal can use an exculpatory clause in an agreement with his or her agent to limit his or her liability for fraud by limiting the agent's authority. On the other hand, while an innocent principal will not be held liable for the fraud in such a situation, he or she may not gain by it either. Thus, the defrauded party may still rescind even though he or she may not have other remedies [*Harnischfeger Sales Corp. v. Coats* (1935) 4 Cal. 2d 319, 320, 48 P.2d 662] .

[k] Negligence of Defrauded Party

As a general rule, when a party does not read a contract or is otherwise negligent in failing to discover all of the facts with respect to the contract, he or she cannot avoid the contract on the ground that he or she was mistaken about the contract or did not realize what it meant [*Greve v. Taft Realty Co.* (1929) 101 Cal. App. 343, 351-352, 281 P. 641] . However, in the case of fraud, the defrauded party's negligence in failing to discover the falsity of a statement is no defense if the misrepresentation is intentional rather than negligent [*Seeger v. Odell* (1941) 18 Cal. 2d 409, 414-415, 115 P.2d 977] . Even when a party is so negligent as to fail to read the contract before signing it, the contract is subject to rescission or reformation if it was induced by fraud [*California Trust Co. v. Cohn* (1932) 214 Cal. 619, 627, 7 P.2d 297] . Even if the fraud was not intentional and was merely the result of negligent misrepresentation, a party who misrepresents the facts and induces the other party to rely on the statements still cannot raise the defense that the other party's reliance was negligent unless the other party's conduct, in light of that party's intelligence and information, is preposterous or irrational [*Van Meter v. Bent Construction Co.* (1956) 46 Cal. 2d 588, 595, 297 P.2d 644 ; see *Reid v. Landon* (1958) 166 Cal. App. 2d 476, 482, 333 P.2d 432] .

[2] FORM

Clause--Fraud as Ground for Rescission

[EITHER]

The ground for rescission of the contract is that at the time the contract was made, you misrepresented material facts concerning the contract with intent to [deceive me or induce me to enter into the contract]. Specifically, _____[specify misrepresentation, e.g., even though you knew at the time that this statement was false, you stated that the property was free of fill so that I could build on it immediately, when in fact the property was filled to an average depth of 12 feet and requires a large expenditure in order to prepare it for construction].

[OR]

The ground for rescission of the contract is that at the time the contract was made, you [specify unwarranted assertion, e.g., made an assertion of fact that was not warranted by the information in your possession or asserted, without the

benefit of any positive information or test results on the subject, that if I dug a well to a depth of 50 feet, I could pump 50 gallons per minute, when in fact the water table is well below 100 feet beneath the surface]. You made that assertion with intent to [deceive me *or* induce me to enter into the contract].

[OR]

The ground for rescission of the contract is that at the time the contract was made, you knew _____ [specify suppressed facts, e.g., that the property being purchased under that contract was to be used by me for my residence but was about to be condemned by the city for use as a park], but you [concealed *or* suppressed] that fact with the intent to [deceive me *or* induce me to enter into the contract].

[OR]

The ground for rescission of the contract is that at the time the contract was made, you promised me that _____ [specify false promise, e.g., you would do anything that was necessary to make the land ready for building, when in fact you had no intention of performing this promise]. This promise was made with the intent to [deceive me *or* induce me to enter into the contract].

[OR]

The ground for rescission of the contract is that at the time of that transaction, you were in a fiduciary relationship with me as [describe other party's status as fiduciary of rescinding party, e.g., my financial advisor], and as a result of that transaction you gained an advantage over me by misleading me to my prejudice. Specifically, you _____ [describe how fiduciary misled and thereby gained advantage over rescinding party to latter's prejudice, e.g., advised me to sell _____ (specify) to you, even though you had reasonable grounds for believing that its value would increase in the foreseeable future].

Legal Topics:

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

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DIVISION V: CONTRACTS AND OBLIGATIONS

CHAPTER 77 DISCHARGE OF OBLIGATIONS

PART IV. FORMS

G. Rescission

3. Grounds for Unilateral Rescission

27-77 California Legal Forms--Transaction Guide § 77.354

§ 77.354 Clause--Failure of Consideration as Ground for Rescission

[1] Comment

[a] Use of Form

The form in [2], *below*, sets forth alternative clauses for use in stating, as a ground for unilateral rescission, that there has been a failure of consideration (including void consideration) [*Civ. Code § 1689(b)(24)*]. The appropriate alternative is intended for use as part of a notice of rescission [*see § 77.340[2]*]. For discussion of rescission in general, see § 77.340[1]. For clauses stating and describing other grounds for rescission, see §§ 77.350-77.353, 77.355, and 77.356.

[b] Failure of Consideration as Ground for Rescission

A contract is subject to rescission if the consideration for the obligation of the rescinding party fails, in whole or in part, through the fault of the party against whom the rescission is exercised [*Civ. Code § 1689(b)(2)*] or if the consideration for the obligation of the rescinding party fails in a material respect from any cause before it is rendered to the rescinding party [*Civ. Code § 1689(b)(4)*]. A party may also rescind a contract if the consideration for his or her obligation becomes entirely void for any reason [*Civ. Code § 1689(b)(3)*].

[c] Fault of Other Party

When there has been a willful breach of a promise, the performance of which was to act as consideration for some other performance by the rescinding party, the breach is a failure of consideration resulting from the fault of the party as to whom rescission is made and is thus valid ground for rescission by the injured party [*Bliss v. California Cooperative Producers* (1947) 30 Cal. 2d 240, 248, 181 P.2d 369 ; *see Civ. Code § 1689(b)(2)*].

One qualification to this rule is that the breach must be reasonably substantial--it must be so material as to go to the essence of the agreement [*Crofoot Lumber, Inc. v. Thompson* (1958) 163 Cal. App. 2d 324, 332-333, 329 P.2d 302] . The breach of some minor part of the contract, such as missing a day of work resulting from illness, ordinarily will not

provide a ground for rescission of the entire contract [see *Rench v. Watsonville Meat Co. (1956) 138 Cal. App. 2d 482, 488, 292 P.2d 85*] . Courts examine contracts closely in cases of partial failure of consideration, and only when the contract is indivisible (for instance, a contract for the building of a machine) will rescission be allowed [*Jozovich v. Central California Berry Growers Asso. (1960) 183 Cal. App. 2d 216, 222, 6 Cal. Rptr. 617*] .

As a general rule, delay in the performance of a party's contractual duties is not a ground for rescission unless the contract specifies that time is of the essence [*Henck v. Lake Hemet Water Co. (1937) 9 Cal. 2d 136, 143, 69 P.2d 849*] . Even when there is no such specification, the party who delays may have to offer compensation for any injury the delay caused, in order to avoid rescission [Civ. Code § 1492]. When delay is unreasonably long, the injured party may conclude that the delaying party does not intend to perform, and rescission is proper [*Hofland v. Gustafson (1955) 132 Cal. App. 907, 132 Cal. App. 2d Supp. 907, 909-910, 282 P.2d 1039*] .

[d] Void Consideration

When the consideration for the obligation of a party becomes totally void from any cause, that party may rescind the contract [Civ. Code § 1689(b)(3)]. One example of void consideration is that which is illegal [Civ. Code § 1608; *C.I.T. Corp. v. Breckenridge (1944) 63 Cal. App. 2d 198, 200, 146 P.2d 271* ; see § 77.355[1]].

[e] Failure of Consideration Before Delivery

When the consideration for the obligation of a party fails in a material respect from any cause before that party receives that consideration, he or she may rescind the contract [Civ. Code § 1689(b)(4)]. This means that until a contract is performed, each party remains responsible for any loss or damage to that which he or she intends to surrender under the contract. For example, if one party wins a prefabricated house in a raffle, sells it to a second party, and then the house is not delivered by the manufacturer, the purchasing party may rescind on the ground that the consideration for his or her payment failed before he or she received it. However, if the parties had agreed to sell the winning ticket or the right to receive the house (rather than the house itself), the purchaser would have received the consideration, and the loss would have been his or her own [*Nelson v. Sperling (1969) 270 Cal. App. 2d 194, 195, 196, 76 Cal. Rptr. 481*] .

[2] FORM

Clause--Failure of Consideration as Ground for

[EITHER]

The ground for rescission of the contract is that there has been a failure of consideration due me because you have breached the contract. Specifically, you [specify nature of breach].

[OR]

The ground for rescission of the contract is that the consideration that I was to receive under the contract has failed materially. Specifically, [describe failure of consideration, e.g., the barn on the farm that was to be sold under that contract has burned down, making the farm practically unusable by me].

[OR]

The ground for rescission of the contract is that the consideration I was to receive under that contract, [describe consideration], has become void [specify, e.g., under legislation passed subsequent to execution of that contract].

Legal Topics:

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

Contracts LawConsiderationGeneral OverviewContracts LawRemediesRescission & RedhibitionGeneral Overview



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G. Rescission

3. Grounds for Unilateral Rescission

27-77 California Legal Forms--Transaction Guide § 77.355

§ 77.355 Clause--Illegality of Contract as Ground for Rescission

[1] Comment

[a] Use of Form

The form in [2], *below*, sets forth alternative clauses for use in stating, as a ground for unilateral rescission of a contract, that the contract is illegal [*Civ. Code § 1689(b)(5)*]. The appropriate alternative is intended for use as part of a notice of rescission [*see § 77.340[2]*]. For discussion of rescission in general, *see § 77.340[1]*. For clauses stating and describing other grounds for rescission, *see §§ 77.350-77.354 and 77.356*.

[b] When Rescission Is Allowed for Illegality

If a contract is unlawful for causes that do not appear in its terms or conditions, and the parties are not equally at fault, a party to the contract may rescind it [*Civ. Code § 1689(b)(5)*]. For discussion of the types of contracts that are illegal, *see [c], below*.

Parties to an illegal contract are considered unequally at fault when one party is justifiably ignorant of facts that make the contract illegal while the other party is not [*Tiedje v. Aluminum Taper Milling Co. (1956) 46 Cal. 2d 450, 454, 296 P.2d 554*] . Closely related to justifiable ignorance, and often coinciding with it, is the situation in which the injured party is a member of the very class that the violated statute was designed to protect. An example of the latter situation is a party who violates licensing statutes and later seeks to escape enforcement or rescission on the ground that the contract was illegal because he or she was unlicensed. Courts will allow rescission in such a case when the purpose of the licensing statute is to protect innocent parties from unscrupulous or ill-trained business practitioners [*Holland v. Morgan & Peacock Properties (1959) 168 Cal. App. 2d 206, 211, 335 P.2d 769*] . Usurious contracts are another example of contracts that violate a law specifically intended to protect the parties injured by the illegal contract terms [*Carter v. Seaboard Finance Co. (1949) 33 Cal. 2d 564, 574, 203 P.2d 758*] .

A court may find the parties to an illegal contract not in *pari delicto* when one of them did not consent freely [*see §§*

77.350-77.353]. Thus, if consent to the illegality was obtained by duress, menace, or undue influence, the parties are not in pari delicto, and rescission is allowable [*Colby v. Title Ins. and Trust Co.* (1911) 160 Cal. 632, 640-641, 117 P. 913] .

When a party repudiates the illegal part of a contract before it is performed, rescission will normally be allowed [*Severance v. Knight-Counihan Co.* (1947) 29 Cal. 2d 561, 569, 177 P.2d 4] .

[c] Contract Prohibited by Law

A contract is unlawful if it is specifically prohibited by law [Civ. Code § 1667(1)]. Thus, if a statute or ordinance prohibited firefighters from taking other gainful employment, any outside employment contract made by a firefighter would be illegal. This rule does not apply to prohibitions found only in departmental rules [*Vick v. Patterson* (1958) 158 Cal. App. 2d 414, 417, 322 P.2d 548] .

[d] Contract Contrary to Policy of Express Law

Even if a statute or ordinance does not expressly prohibit the activity in question, if it makes it clear that the act is contrary to the policy of that law, a contract having that activity as an object is illegal [Civ. Code § 1667(2)]. Thus, for example, when securities are sold without a permit or contrary to the specifications of a required permit, and this act carries a statutory penalty, the sale may be void for illegality [*Stonehocker v. Cassano* (1957) 154 Cal. App. 2d 732, 736, 316 P.2d 717] .

[e] Contract Contrary to Good Morals

A contract is unlawful if it is contrary to "good morals" [Civ. Code § 1667(3)]. This issue can arise, for example, in disputes over the validity of nonmarital cohabitation agreements. In this context, agreements between nonmarital partners are invalid only to the extent that they rest on a consideration of meretricious sexual services [*Marvin v. Marvin* (1976) 18 Cal. 3d 660, 670-671, 134 Cal. Rptr. 815, 557 P.2d 106] . In practice, this rule has been applied to invalidate contracts as well as to uphold their validity. For example, when the rendition of sexual services by one man to another was an inseparable part of the consideration for an agreement, the courts refused to enforce it on the ground that the consideration was illicit and meretricious [*Jones v. Daly* (1981) 122 Cal. App. 3d 500, 506-509, 176 Cal. Rptr. 130] .

[f] Effect of Illegal Contract

One of the essential elements of a valid contract is a lawful purpose [Civ. Code § 1550]. As a general rule, therefore, a contract whose object is unlawful is void [*Vick v. Patterson* (1958) 158 Cal. App. 2d 414, 417, 322 P.2d 548] . This means that a court will not lend its aid to enforce the agreement [*Stonehocker v. Cassano* (1957) 154 Cal. App. 2d 732, 736, 316 P.2d 717] . However, if a contract is adjudged void for illegality, the party not at fault may seek restitution of the consideration given [*Baum v. Aleman* (1956) 139 Cal. App. 2d Supp. 929, 933] . This recovery is allowed on the theory that permitting the other party to keep the payment would result in unjust enrichment and would reward that party for the unlawful actions [*Baum v. Aleman* (1956) 139 Cal. App. 2d Supp. 929, 933; see *Griffis v. Squire* (1968) 267 Cal. App. 2d 461, 472, 73 Cal. Rptr. 154] .

When the parties who have entered into an illegal contract are equally at fault--or in pari delicto--the law will not aid either to recover anything under the contract [*Colby v. Title Ins. and Trust Co.* (1911) 160 Cal. 632, 640, 117 P. 913] . The parties in such a situation will be left by the courts to their own devices in settling their differences [*Tiedje v. Aluminum Taper Milling Co.* (1956) 46 Cal. 2d 450, 453-454, 296 P.2d 554] .

[g] Severability of Illegality

When a contract contains a partial illegality (for example, when there is a contract to build eight homes, but two are to be built on land zoned to prohibit any such building), a question is raised as to the severability of the illegal portion of the agreement. If possible, the legal portions of a contract will be left standing [*Civ. Code* § 1599; *see, e.g., Birbrower, Montalbano, Condon & Frank v. Superior Court* (1998) 17 Cal. 4th 119, 137-140, 140, 70 Cal. Rptr. 2d 304, 949 P.2d 1 (attorneys' fees agreement was not entirely unenforceable because of New York law firm's unauthorized practice of law in California; statutory violation did not preclude recovery under agreement for limited services performed outside California)].

If any part of a single consideration for one or more objects, or of several considerations for a single object, is unlawful, the entire contract is void [*Civ. Code* § 1608]. If a court finds the contract indivisible, it may attempt to determine the fair value of the illegal portion of such a contract and leave the rest of it intact [*Keene v. Harling* (1964) 61 Cal. 2d 318, 322-323, 38 Cal. Rptr. 513, 392 P.2d 273] .

[2] FORM

Clause--Illegality of Contract as Ground for Rescission

[EITHER]

The ground for rescission of the contract is that it [provides for or requires] [*summarize illegal matter*]. That [provision or requirement] is expressly prohibited by [*statutory citation*].

[OR]

The ground for rescission of the contract is that it [provides for or requires] [*summarize matter contrary to policy of express law, e.g., the sale of securities in violation of the conditions of the registration authorizing such sale*]. That [provision or requirement] is contrary to the policy of express law set forth in [*statutory citation*].

[OR]

The ground for rescission of the contract is that it [provides for or requires] [*summarize matter contrary to good morals, e.g., one of the parties to live together with the other party and render sexual services to that other party as an inseparable part of the consideration for that contract*].

Legal Topics:

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

Contracts LawContract Conditions & ProvisionsGeneral OverviewContracts LawDefensesIllegal BargainsContracts LawRemediesRescission & RedhibitionGeneral Overview



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DIVISION V: CONTRACTS AND OBLIGATIONS

CHAPTER 77 DISCHARGE OF OBLIGATIONS

PART IV. FORMS

G. Rescission

3. Grounds for Unilateral Rescission

27-77 California Legal Forms--Transaction Guide § 77.356

§ 77.356 Clause--Contract Prejudicial to Public Interest as Ground for Rescission

[1] Comment

[a] Use of Form

The form in [2], below, sets forth a clause for use in stating, as a ground for unilateral rescission of a contract, that the contract is prejudicial to the public interest [*Civ. Code § 1689(b)(6)*]. The appropriate alternative is intended for use as part of a notice of rescission [see § 77.340[2]]. For discussion of rescission in general, see § 77.340[1]. For clauses stating and describing other grounds for rescission, see §§ 77.350-77.355.

[b] Contract Prejudicial to Public Interest

A contract may be rescinded if it is prejudicial to the public interest [*Civ. Code § 1689(b)(6)*]. A major problem is that it is not always easy to determine what is prejudicial to the public interest. The statutory provision for rescission on the ground of public policy is left open-ended in order that courts may balance public and private interests in these cases to reach the most equitable solution [*People ex rel. Mosk v. Barenfeld* (1962) 203 Cal. App. 2d 166, 181-183, 21 Cal. Rptr. 501] . Thus, under the statute, even parties in *pari delicto* may be granted rescission if circumstances dictate such a solution in the public interest. (The cases in which a party repudiates an executory illegal contract [see § 77.355] are examples of this kind of decision, but public policy-inspired exceptions are not limited to these cases.)

[2] FORM

Clause--Contract Prejudicial to Public Interest as Ground

The ground for rescission of the contract is prejudice to the public interest. Specifically, the contract [provides for or requires] [*summarize matter prejudicial to public policy*]. That [provision or requirement] is contrary to public policy _____ [*specify grounds or authority for statement, e.g., as defined by the Supreme Court of California* in _____ (*case citation*)].

Legal Topics:

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

Contracts LawDefensesGeneral OverviewContracts LawRemediesRescission & RedhibitionGeneral Overview



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G. Rescission

3. Grounds for Unilateral Rescission

27-77 California Legal Forms--Transaction Guide §§ 77.357-77.359

[Reserved]

§§ 77.357[Reserved]



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CHAPTER 77 DISCHARGE OF OBLIGATIONS

PART IV. FORMS

H. Cancellation of Contract

1. Termination for Breach

27-77 California Legal Forms--Transaction Guide § 77.360

§ 77.360 Notice of Termination--Material Breach

[1] Comment

[a] Use of Form

The form in [2], below, is a notice of termination of a contract for material breach. It is intended for use by a nonbreaching party to a contract to notify the breaching party of the intention to terminate the contract.

[b] Material Breach Justifying Termination

When one of the parties to a contract has breached it, the other party has the right and option to terminate it for cause and sue for damages [*B.L. Metcalf General Contractor, Inc. v. Earl Erne, Inc. (1963) 212 Cal. App. 2d 689, 693, 28 Cal. Rptr. 382*] . However, the right of a nonbreaching party to terminate a contract and claim discharge from his or her obligations under that contract depends on the materiality of the breach [see *Taliaferro v. Davis (1963) 216 Cal. App. 2d 398, 412, 31 Cal. Rptr. 164*] . When the effects of a breach are so material to the interests of the nonbreaching party that judicial remedies do not do justice to that party, his or her legal duties are either suspended or discharged [*Mad River Lbr. Sales, Inc. v. Willburn (1962) 205 Cal. App. 2d 321, 325, 22 Cal. Rptr. 918*] .

Three types of conduct constitute a material breach:

- A party's deliberate unjustified failure to perform his or her immediate obligation, affecting the whole contract [*Integrated, Inc. v. Alec Fergusson Electrical Contractor (1967) 250 Cal. App. 2d 287, 295, 58 Cal. Rptr. 503*] .
- An act that prevents the aggrieved party from performing his or her contractual obligation [*Unruh v. Smith (1954) 123 Cal. App. 2d 431, 437, 267 P.2d 52*] .
- Conduct by the breaching party that prevents the fulfillment of his or her own obligation [*Parsons*

v. Bristol Development Co. (1965) 62 Cal. 2d 861, 868, 44 Cal. Rptr. 767, 402 P.2d 839] .

A willful default going to the whole of the contract may be material even though no economic loss ensues to the injured party [*Wilson v. Corrugated Kraft Containers (1953) 117 Cal. App. 2d 691, 697, 256 P.2d 1012] .*

[2] FORM

Notice of Termination--Material Breach

NOTICE OF TERMINATION

_____[date]
To: _____[name of breaching party]

TAKE NOTICE that the undersigned terminates and cancels that certain contract executed by _____[name of terminating party] and _____[name of breaching party] on _____[date], pursuant to which _____[name of breaching party] agreed to [summarize breaching party's agreement] and _____[name of terminating party] agreed to _____[summarize agreement or describe object of contract, e.g., transfer ownership of a machine to _____(name of transferee)].

The ground for termination of the contract is that _____[name of breaching party] materially breached that contract by [specify breach], causing [specify damage suffered by terminating party].

_____[signature of rescinding party]
_____[typed name]

Legal Topics:

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

Contracts LawBreachMaterial BreachContracts LawPerformanceDischarges & Terminations



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DIVISION V: CONTRACTS AND OBLIGATIONS

CHAPTER 77 DISCHARGE OF OBLIGATIONS

PART IV. FORMS

H. Cancellation of Contract

1. Termination for Breach

27-77 California Legal Forms--Transaction Guide § 77.361

§ 77.361 Notice of Termination--Anticipatory Breach

[1] Comment

[a] Use of Form

The form in[2], *below*, is a notice by one party to the other party terminating a contract on the ground that the other party is guilty of anticipatory breach or repudiation of the contract. This form is for use if the repudiating party is guilty of an anticipatory breach resulting from an unequivocal declaration that he or she absolutely will not perform his or her obligation, or resulting from a statement that he or she will breach an important contractual promise, thereby substantially impairing the value of the contract.

[b] What Constitutes Anticipatory Breach

California recognizes the doctrine of breach by anticipatory repudiation, that is, that a breach may occur when a party declares an intention to breach before the actual breach occurs [*Guerrieri v. Severini* (1958) 51 Cal. 2d 12, 18, 330 P.2d 635 ; *see Civ. Code § 1440*]. Termination based on the doctrine of breach by anticipatory repudiation can be justified only if the breaching party's conduct or declaration unequivocally shows that he or she absolutely will not perform his or her duties [*McWilliams v. Holton* (1967) 248 Cal. App. 2d 447, 452, 56 Cal. Rptr. 574 ; *Johnson v. Meyer* (1962) 209 Cal. App. 2d 736, 741, 26 Cal. Rptr. 157] . A mere declaration by a party to a contract of an intention not to be bound (as distinguished from a declaration that unequivocally shows that he or she absolutely will not perform his or her duties) will not of itself amount to a breach [*Early v. Santa Clara Broadcasting Co.* (1962) 211 Cal. App. 2d 367, 371, 27 Cal. Rptr. 212 ; *Salot v. Wershow* (1958) 157 Cal. App. 2d 352, 357, 320 P.2d 926 ; *Atkinson v. District Board Co.* (1935) 5 Cal. App. 2d 738, 743, 43 P.2d 867] .

For discussion of anticipatory repudiation in the context of contracts for the sale of goods [see *Com. Code §§ 2610, 2611*], see Ch. 52, *Sales of Goods Under the Uniform Commercial Code* .

The United States Supreme Court has held that an obligor that stated it would break or did break an important

contractual promise, thereby substantially impairing the value of contracts to the obligees, must refund the obligees' money unless the obligees waive their rights to restitution, regardless of whether the contracts ultimately would have proved financially beneficial to the obligees [*Mobil Oil Exploration & Producing Southeast, Inc. v. United States* (2000) 530 U.S. 604, 120 S. Ct. 2423, 2437-2438, 147 L. Ed. 2d 528 (involving federal government contract)].

[2] FORM

Notice of Termination--Anticipatory Breach

NOTICE OF TERMINATION

_____[date]
To: _____[name of breaching party]

TAKE NOTICE that the undersigned terminates and cancels that certain contract executed by _____[name of terminating party] and _____[name of repudiating party] on _____[date], pursuant to which _____[name of repudiating party] agreed to [summarize agreement] and _____[name of terminating party] agreed to _____[summarize agreement or describe object of contract, e.g., transfer ownership of a machine to _____(name of transferee)].

The ground for termination of the contract is that _____[name of repudiating party] materially breached the contract by [specify conduct or declarations of repudiating party that constitute anticipatory breach, e.g., transferring the machine to another party or declaring that _____(name of repudiating party) would not fulfill the terms of that contract], causing [specify injury resulting to terminating party].

_____[signature of rescinding party]
_____[typed name]

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawBreachAnticipatory RepudiationGeneral OverviewContracts LawPerformanceDischarges & Terminations



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DIVISION V: CONTRACTS AND OBLIGATIONS

CHAPTER 77 DISCHARGE OF OBLIGATIONS

PART IV. FORMS

H. Cancellation of Contract

1. Termination for Breach

27-77 California Legal Forms--Transaction Guide § 77.362

§ 77.362 Notice of Termination--Severable Part of Contract

[1] Comment

[a] Use of Form

The form in [2], below, is a notice of termination of a severable part of a contract. It is intended for use by a nonbreaching party to notify a breaching party of the former's intention to terminate the breached part of a severable contract. This form will have the effect of abrogating the unperformed terms of the severable part of the contract. It should be used only if there has been a material breach of the severable part. For discussion of materiality, see § 77.360[1].

[b] Severable Contracts

A severable contract is one that is susceptible of division, that is, a contract having two or more parts not necessarily dependent on each other [*Gross v. Maytex Knitting Mills* (1953) 116 Cal. App. 2d 705, 711, 254 P.2d 163] . For example, a contract to purchase or service different items at the same time is a severable contract. This point can be better illustrated by comparing the results of a breach going to the whole contract to a breach going to a severable part. When a party's refusal to perform goes to the entirety of a contract, there is a breach of the whole. However, if the breach is of a severable part--for instance, one installment out of numerous installments--it is not a breach of the whole contract but only of the severable installment. The breach of one severable part does not excuse nonperformance of others [*Fresno Canal & Irrigation Co. v. Perrin* (1915) 170 Cal. 411, 416, 149 P. 805 ; *Verdier v. Verdier* (1955) 133 Cal. App. 2d 325, 334, 284 P.2d 94 ; *Hall v. Dekker* (1941) 45 Cal. App. 2d 783, 788, 115 P.2d 15 ; see *Simmons v. Cal. Institute of Technology* (1949) 34 Cal. 2d 264, 275-276, 209 P.2d 581 (rescission of severable contract)].

[2] FORM

Notice of Termination--Severable Part of Contract

NOTICE OF TERMINATION

_____[date]
 To: _____[name of breaching party]

TAKE NOTICE that the undersigned terminates and cancels the provisions of Paragraph [number] of that certain contract executed by _____[name of terminating party] and _____[name of repudiating party] on _____[date], pursuant to which _____[name of repudiating party] agreed to [summarize severable obligation of breaching party] and _____[name of terminating party] agreed to [summarize terminating party's agreement or describe object of repudiated part].

The ground for termination of the contract provision is that _____[name of repudiating party] materially breached that provision by [specify conduct of repudiating party that constitutes breach], causing [specify injury to terminating party].

This termination does not affect the obligations of either party under the remainder of the contract. To that extent, the provisions of the contract shall remain in full force and effect.

_____[signature of rescinding party]
 _____[typed name]

Legal Topics:

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

Contracts Law Performance Discharges & Terminations Contracts Law Types of Contracts Divisible Contracts



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DIVISION V: CONTRACTS AND OBLIGATIONS

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H. Cancellation of Contract

1. Termination for Breach

27-77 California Legal Forms--Transaction Guide §§ 77.363-77.369

[Reserved]

§§ 77.363[Reserved]



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DIVISION V: CONTRACTS AND OBLIGATIONS

CHAPTER 77 DISCHARGE OF OBLIGATIONS

PART IV. FORMS

H. Cancellation of Contract

2. Cancellation by Act of Parties

27-77 California Legal Forms--Transaction Guide § 77.370

§ 77.370 Agreement to Cancel Contract

[1] Comment

[a] Use of Form

The form in [2], *below*, is an agreement by all parties to a contract to cancel that contract. Although cancellation can be accomplished by physical acts as well as agreements between the parties if the requisite intent is established [*see [b], below*], a written agreement supplies ready evidence of the intent of the parties and the desired effect.

[b] Cancellation of Written Contract

The cancellation of a written contract, with intent to extinguish the obligations established by the contract, extinguishes it as to all parties consenting to the cancellation [*Civ. Code § 1699*]. A cancellation agreement does away with all of the prior agreement that remains unperformed, on the terms and conditions set forth in the cancellation agreement [*Mamula v. McCulloch (1969) 275 Cal. App. 2d 184, 197, 79 Cal. Rptr. 571*]. Destruction of the written contract or the signatures of the parties with the intent to extinguish the contract will also extinguish the contract as to all parties consenting to the act [*Civ. Code § 1699*]. In the case of either cancellation or destruction, the parties must both consent to the act and intend that it operate to extinguish the contract [*see Civ. Code § 1699*].

For additional discussion of cancellation, see § 77.23.

[c] Distinction Between Cancellation and Rescission

Although rescission is sometimes referred to as, or confused with, cancellation, they are not the same [*Pico Citizens Bank v. Tafco, Inc. (1962) 201 Cal. App. 2d 131, 136, 19 Cal. Rptr. 905*]. To cancel a contract means to abrogate all of it that remains unperformed, while rescission means restoration of the parties to their former positions. In other words, cancellation refers to the state of things at the time of cancellation; rescission refers to the state of things existing when the contract was made [*Mamula v. McCulloch (1969) 275 Cal. App. 2d 184, 197, 79 Cal. Rptr. 571*]. For discussion

of rescission, see §§ 77.22, 77.330[1], and 77.340[1].

Cancellation and termination have a different meanings in Division 2 of the Commercial Code [*see Com. Code § 2106(3), (4)*], which governs contracts for the sale of goods. For discussion, see § 77.23[3] and Ch. 52, *Sales of Goods Under the Uniform Commercial Code*.

[d] Effect of Unilateral Destruction, Cancellation or Alteration of Contract

If a party who is entitled to any benefit under a contract intentionally destroys, cancels, or materially alters it, all executory obligations owed to that party by nonconsenting parties are extinguished [*Civ. Code § 1700*]. However, this rule does not apply when only one of duplicate copies of a contract is canceled, destroyed, or materially altered [*Civ. Code § 1701*].

[2] FORM

Agreement to Cancel Contract

CANCELLATION AGREEMENT

_____[*name of party*], _____[*address*], and _____[*name of party*],
 _____[*address*], agree to cancel that certain contract between them dated
 _____[*date*], [*describe contract by its title, contents, purpose, or effect, e.g., for the provision of*
janitorial service]. The parties agree that cancellation of the contract is made with their mutual and express intent to
 extinguish all obligations imposed on them by the contract.

Executed _____[*date*] at _____[*city*], California.

_____[*signature of first party*]
 _____[*typed name*]
 _____[*signature of second party*]
 _____[*typed name*]

Legal Topics:

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

Contracts LawPerformanceGeneral OverviewContracts LawRemediesRescission & RedhibitionGeneral
 OverviewContracts LawTypes of ContractsGeneral Overview



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DIVISION V: CONTRACTS AND OBLIGATIONS
CHAPTER 78 CREDITORS' AGREEMENTS: NONBANKRUPTCY ALTERNATIVES

27-78 California Legal Forms--Transaction Guide 78.syn

AUTHOR: John A. Vos, Practice Consultant

§ 78.syn Synopsis to Chapter 78: CREDITORS' AGREEMENTS: NONBANKRUPTCY ALTERNATIVES

§ 78.01 California Statutes

[1] In General

[2] Commercial Code

§ 78.02 Federal Statutes

§§ 78.03-78.04 [Reserved]

§ 78.05 Law Reviews

§ 78.06 Annotations

§ 78.07 Text References

[1] Matthew Bender Sources

[2] Additional Text References

§§ 78.08-78.09 [Reserved]

§ 78.10 Debtor's Financial Position

§ 78.11 Advantages and Disadvantages of Nonbankruptcy Relief

§ 78.12 Creditors' Agreements

[1] Obstacles to Implementation

- [a] Dissenting Creditors

- [b] Claims Given Priority Under State or Federal Law

- [c] Secured Claims

- [2] Types of Agreements

- [a] Extension Agreement

- [b] Composition Agreement

- [c] Combination Agreement

- [3] Initiation and Negotiation

- [4] Creditors' Committees

- [5] Effect in Ensuing Chapter 11 Reorganization

- § 78.13 Assignment for Benefit of Creditors

- [1] In General

- [a] Nature and Purpose of Assignment

- [b] Secured, Priority Unsecured, and Other Unsecured Claims

- [c] Sale of Assets

- [d] Distribution of Proceeds

- [e] Assignment for Fewer Than All Creditors

- [f] Assignment Under Attachment Law

- [2] General Effects on Debtor's Property

- [a] Exempt Property

- [b] Divestment of Debtor's Interests

- [c] Conveyance of Real Property

- [d] Transfer of Personal Property

- [3] Parties Bound by Assignment

- [4] Assignee's Rights and Duties

[a] In General

[b] Right to Set Aside Fraudulent Transfer

[c] Right to Recover Preferential Transfers

[5] Priority Claims

[6] Effect on Bankruptcy Proceeding

[7] Discharge of Debtor

§ 78.14 Tax Consequences

[1] For Debtor

[a] General Rule

[b] Voluntary Forgiveness of Debt

[c] Reduction of Cost

[d] Insolvent Debtor

[2] For Creditor

§ 78.15 Bankruptcy Law

[1] Bankruptcy Code

[2] Priorities

[3] Exempt Property

[4] Reorganization (Chapter 11)

[a] Advantages

[b] Commencement Procedure

[c] Creditors' or Security Holders' Committee

[d] Filing and Contents of Plan

[e] Acceptance of Plan by Creditors

[f] Requirements for Court Confirmation

[g] Effect of Confirmation

[h] Appointment of Trustee or Examiner

[i] Recovery of Property

[j] Acceptance of Leases

[k] Assumption of Collective Bargaining Agreements

[5] Liquidation (Chapter 7)

[a] In General

[b] Governing Law

[c] Qualified Debtors

[d] Commencement of Case

[e] Bankruptcy Estate

[f] Dischargeable Debts

[g] Distribution of Estate and Discharge of Debtor

§§ 78.16-78.99 [Reserved]

§ 78.100 Facts

Scope

§ 78.101 Documents

Scope

§§ 78.102-78.109 [Reserved]

§ 78.110 Debtor's General Financial Condition

Scope

§ 78.111 Feasibility of Nonbankruptcy Rehabilitation

Scope

§§ 78.112-78.119 [Reserved]

§ 78.120 Alternative Procedures

Scope

§ 78.121 Creditors' Meeting

Scope

§ 78.122 Soliciting Acceptance of Creditors

Scope

§ 78.123 Assignment for Benefit of Creditors

Scope

§§ 78.124-78.129 [Reserved]

§ 78.130 Introductory Provisions

Scope

§ 78.131 Disposition of Debts and Claims

Scope

§ 78.132 Operation of Debtor's Business During Term of Agreement

Scope

§ 78.133 Effectiveness and Term of Agreement

Scope

§ 78.134 Creditors' Representative

Scope

§ 78.135 Defaults by Debtor and Termination of Agreement

Scope

§ 78.136 Miscellaneous Provisions

Scope

§ 78.137 Provisions for Bankruptcy Reorganization Plan

Scope

§§ 78.138-78.199 [Reserved]

§ 78.200 Secured Extension Agreement for Debtor and One Creditor

[1] Comment--Use of Form

[2] FORM

Secured Extension Agreement for Debtor and One Creditor

§ 78.201 Secured Extension Agreement With Multiple Creditors

[1] Comment

[a] Use of Form

[b] Creditors' Committee and Agent

[c] Bond

[d] Effectiveness and Term of Agreement

[e] Termination

[2] FORM

Secured Extension Agreement With Multiple Creditors

§ 78.202 Agreement for Creditors' Forbearance and Supervision of Debtor's Business

[1] Comment

[a] Use of Form

[b] Effectiveness of Agreement

[c] Creditors' Committee

[d] Restrictions on Operation of Business

[e] Liquidation of Debts

[2] FORM

Agreement for Creditors' Forbearance and Supervision of Debtor's Business

§ 78.203 Agreement Extending Time for Payment of Note and Adding Guarantor

[1] Comment--Use of Form

[2] FORM

Agreement Extending Time for Payment of Note and Adding Guarantor

§ 78.204 Creditor's Agreement to Delay Enforcement of Mechanic's Lien

[1] Comment

[a] Use of Form

[b] Mechanic's Lien and Extension Agreement

[2] FORM

Creditor's Agreement to Delay Enforcement of Mechanic's Lien

§ 78.205 Composition Agreement--Debt Partially Paid in Installments

[1] Comment

[a] Use of Form

[b] Effectiveness of Agreement

[c] Consideration for Compromise

[d] Good Faith of Parties Required

[e] Effectiveness of Agreement in Ensuing Bankruptcy Reorganization

[2] FORM

Composition Agreement--Debt Partially Paid in Installments

§ 78.206 Composition Agreement Following Assignment for Benefit of Creditors and Using Trustee

[1] Comment

[a] Use of Form

[b] Liquidation of Assets

[2] FORM

Composition Agreement Following Assignment for Benefit of Creditors and Using Trustee

§§ 78.207-78.219 [Reserved]

§ 78.220 Creditors to Elect Payment of Reduced Debt in Cash or of Full Debt in Installments

[1] Comment--Use of Form

[2] FORM

Creditors to Elect Payment of Reduced Debt in Cash or of Full Debt in Installments

§ 78.221 Restrictions on Debtor's Business Operations

[1] Comment--Use of Form

[2] FORM

Restrictions on Debtor's Business Operations

§ 78.222 Affirmative Obligations of Debtor During Term of Agreement

[1] Comment--Use of Form

[2] FORM

Affirmative Obligations of Debtor During Term of Agreement

§ 78.223 Acceptance by Creditors of Subsequent Chapter 11 Reorganization Plan

[1] Comment--Use of Form

[2] FORM

Acceptance by Creditors of Subsequent Chapter 11 Reorganization Plan

§§ 78.224-78.229 [Reserved]

§ 78.230 General Assignment by Proprietor for Benefit of Creditors

[1] Comment

[a] Use of Form

[b] Discharge of Debtor

[c] Assignments Under Attachment Law

[d] Recovery of Preferential Transfers

[e] Property Exempt From General assignment

[f] Fraudulent Transfers by Debtor

[g] Priority of Claims

[h] Power of Attorney

[i] Assignment of Real Property as Conveyance

[j] Recordation of Assignment

[2] FORM

General Assignment by Proprietor for Benefit of Creditors

§ 78.231 General Assignment by Partnership and Partners for Benefit of Creditors

[1] Comment

[a] Use of Form

[b] Ownership of Partnership Assets

[c] Transfers of Partnership Assets

[d] Discharge of Debtor

[2] FORM

General Assignment by Partnership and Partners for Benefit of Creditors

§ 78.232 General Assignment by Corporation for Benefit of Creditors

[1] Comment--Use of Form

[2] FORM

General Assignment by Corporation for Benefit of Creditors

§ 78.233 General Assignment by Limited Liability Company for Benefit of Creditors

[1] Comment--Use of Form

[2] FORM

General Assignment by Limited Liability Company for Benefit of Creditors

§§ 78.234-78.239 [Reserved]

§ 78.240 Notice of General Creditors' Meeting

[1] Comment--Use of Form

[2] FORM

Notice of Creditors' Meeting

§ 78.241 Status Report to Creditors Regarding Debtor's Liquidation

[1] Comment--Use of Form

[2] FORM

Status Report to Creditors

§ 78.242 Notice of Assignee's Sale

[1] Comment--Use of Form

[2] FORM

Notice of Assignee's Sale

§ 78.243 Cover Letter to Creditors Regarding Assignee's Sale

[1] Comment--Use of Form

[2] FORM

Cover Letter to Creditors Regarding Assignee's Sale

John A. Vos, Practice Consultantn*

FOOTNOTES:

(n149)Footnote *. John A. Vos, B.A. UCLA 1976, J.D. Golden Gate University 1978, admitted to the California bar in 1978. Mr. Vos is a commercial litigator in San Rafael, California. He focuses on bankruptcy and financial workouts for both creditors and debtors, and has been a contributor to Matthew Bender publications on debtor-creditor topics for over 10 years. Mr. Vos is a founding member and past President of the Marin County Bankruptcy Lawyers Association, has passed the specialization exam given by the California State Bar in this practice area, and has appeared frequently as a guest on KGO NewsTalk Radio in San Francisco.



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27-78 California Legal Forms--Transaction Guide Scope

AUTHOR: John A. Vos, Practice Consultant

Scope

John A. Vos, Practice Consultant* Scope

This chapter covers creditors' agreements and assignments for the benefit of creditors, which are two of the nonbankruptcy alternatives for relief available to a distressed business debtor. A creditors' agreement--also referred to by a variety of other terms, including work-out agreement, out-of-court agreement, and rehabilitation plan--is a contract between the debtor and the creditors for working out the debtor's financial problems in a nonjudicial and nonbankruptcy context. The agreement may provide for full payment of the debt over an extended period (an extension agreement) or for payment of less than the full amount of the debt (a composition agreement). An assignment for the benefit of creditors is a business liquidation device. The forms in this chapter include complete creditors' agreements, alternative and additional provisions that may be used in those agreements, illustrative assignments for the benefit of creditors, and related notices.

To place the subject of nonbankruptcy relief in context, this chapter provides an overview of Chapter 11 reorganization and Chapter 7 liquidation under the Bankruptcy Code (and Chapter 13 reorganization, a remedy available to individuals as wage earners, is briefly described). Evaluation of the feasibility of nonbankruptcy relief must take into account the ramifications of the bankruptcy procedures, and any recommendation for a client to resolve business debt problems through a nonbankruptcy method should be made only if counsel has adequate familiarity with bankruptcy law.

FOOTNOTES:

(n150)Footnote *. John A. Vos, B.A. UCLA 1976, J.D. Golden Gate University 1978, admitted to the California bar in 1978. Mr. Vos is a commercial litigator in San Rafael, California. He focuses on bankruptcy and financial workouts for both creditors and debtors, and has been a contributor to Matthew Bender publications on debtor-creditor topics for over 10 years. Mr. Vos is a founding member and past President of the Marin County Bankruptcy Lawyers Association, has passed the specialization exam given by the California State Bar in this practice area, and has appeared frequently as a guest on KGO NewsTalk Radio in San Francisco.



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A. Primary Sources

27-78 California Legal Forms--Transaction Guide § 78.01

AUTHOR: John A. Vos, Practice Consultant

§ 78.01 California Statutes

[1] In General

Occupation of leased premises under assignment for benefit of creditors. *CC § 1954.1.*

Uniform Fraudulent Transfer Act. *CC § 3439 et seq.*

Conveyance of personal property without delivery. *CC § 3440 et seq.*

General assignment for benefit of creditors, requirements to terminate lien. *CCP § 493.010 et seq.*

Exemptions from money judgments. *CCP § 703.010 et seq.*

Priority of wage claims. *CCP § 1204.*

Recovery of debtor's preferential transfers. *CCP § 1800.*

Property exempt from general assignment for benefit of creditors. *CCP § 1801.*

[2] Commercial Code

Definitions.

Creditor (includes assignee for benefit of creditors and executor or administrator of insolvent debtor's or assignor's estate). *Com. Code § 1201(13).*

Insolvency proceedings. *Com. Code § 1201(22).*

Insolvent. *Com. Code § 1201(23)*.

Seller's continuing right to substitute goods until occurrence of any of specified events, including insolvency. *Com. Code § 2501(2)*.

Buyer's right to goods on seller's insolvency. *Com. Code § 2502*.

Seller's remedies on discovery of buyer's insolvency. *Com. Code §§ 2702, 2705*.

Rights of holder in due course that may be affected by discharge of obligor in insolvency proceedings. *Com. Code §§ 3302(b), 3305(a)(1), (d)*.

Rights of any person on presentment and transfer of instrument against knowledge of insolvency proceedings. *Com. Code § 3416(a)(5)*.

Insolvency of primary obligor on instrument is ground for enforcing obligation against other party that guaranteed collection. *Com. Code § 3519(d)*.

Presentment excused by insolvency. *Com. Code § 3504(a)*.

General nonliability of bank for insolvency of other bank in chain of collection of instrument. *Com. Code § 4202(c)*.

Warranty of customer and collecting bank against knowledge of insolvency proceedings. *Com. Code § 4207(a)(5)*.

Exemption of assignment for benefit of creditors from bulk-sale division. *Com. Code § 6103(c)(6)*.

Lessor's continuing right to substitute goods until occurrence of any of specified events, including insolvency. *Com. Code § 10218(b)*.

Lessor's duty of restitution on withholding or stopping delivery of goods because of lessee's insolvency. *Com. Code § 10504(c)*.

Lessee's right to goods on lessor's insolvency. *Com. Code § 10522*.

Lessor's remedies on discovery of lessee's insolvency. *Com. Code §§ 10525, 10526*.

Legal Topics:

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

Contracts Law Performance Assignment General Overview Contracts Law Remedies General Overview Contracts Law Types of Contracts General Overview



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A. Primary Sources

27-78 California Legal Forms--Transaction Guide § 78.02

AUTHOR: John A. Vos, Practice Consultant

§ 78.02 Federal Statutes

Bankruptcy Code.

General provisions. *11 U.S.C. § 101 et seq.*

Case commencement and administration. *11 U.S.C. § 301 et seq.*

Creditors, debtor, and estate. *11 U.S.C. § 501 et seq.*

Liquidation. *11 U.S.C. § 701 et seq.*

Reorganization. *11 U.S.C. § 1101 et seq.*

Family farmers and fishermen. *11 U.S.C. § 1201 et seq.*

Adjustment of wage-earners' debts. *11 U.S.C. § 1301 et seq.*

Tax liens. *I.R.C. §§ 6321, 6322.*

Priority of federal debts. *31 U.S.C. § 3713.*

Legal Topics:

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

Bankruptcy LawCase AdministrationGeneral OverviewContracts LawRemediesGeneral OverviewContracts LawTypes of ContractsGeneral Overview



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[Reserved]

§§ 78.03[Reserved]



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B. Secondary Sources

27-78 California Legal Forms--Transaction Guide § 78.05

AUTHOR: John A. Vos, Practice Consultant

§ 78.05 Law Reviews

Godshall & Klyman, *Wading "Upstream" in Leveraged Transactions: Traditional Guarantees v. "Net Worth" Guarantees*, 46 *Bus. Law.* 391 (Feb. 1991).

Weisberg, *Commercial Morality, the Merchant Character, and the History of the Voidable Preference*, 39 *Stan. L. Rev.* 3 (1986).

Schechter, *The Principal Principle: Controlling Creditors Should Be Liable for Their Debtor's Obligations*, 19 *U.C. Davis L. Rev.* 875 (1986).

Note, *Conflict Between the Uniform Commercial Code and the Federal Tax Lien Act*, 7 *Whittier L. Rev.* 1009 (1985).

Weintraub & Resnick, *From the Bankruptcy Courts: Rejection of Time-Share Purchaser Agreements in Bankruptcy--Let the Buyer Beware!* 17 *UCC L.J.* 72 (1984).

Marsh, *New Limitations on the Definition of Debt Under the Bankruptcy Code*, 16 *UCC L.J.* 255 (1984).

Legal Topics:

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

Contracts Law Remedies General Overview Contracts Law Types of Contracts General Overview



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27-78 California Legal Forms--Transaction Guide § 78.06

AUTHOR: John A. Vos, Practice Consultant

§ 78.06 Annotations

Annot., Extensions of Time Under § 108(b) of Bankruptcy Code (11 USCS § 108(b)), 96 A.L.R. Fed. 699 (1990).

Annot., Debtor's Transfer of Assets to Representatives of Creditors as Effectuating Release of Unsecured Claims, in Absence of Express Agreement to That Effect, 8 A.L.R.3d 903.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawTypes of ContractsGeneral Overview



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B. Secondary Sources

27-78 California Legal Forms--Transaction Guide § 78.07

AUTHOR: John A. Vos, Practice Consultant

§ 78.07 Text References

[1] Matthew Bender Sources

California Legal Forms (Matthew Bender).
Ch. 42, *Secured Transactions*.
Ch. 75, *Formation of Contracts and Standard Contractual Provisions*.
Ch. 76, *Assignment of Rights and Obligations*.
Ch. 77, *Discharge of Obligations*.
Ch. 79, *Suretyship, Guaranty, and Indemnity*.
Ch. 98, *Powers of Attorney*.

California Forms of Pleading and Practice (Matthew Bender).
Ch. 62, *Attachment*.
Ch. 94, *Bankruptcy*.
Ch. 307, *Insolvency*.

California Points and Authorities (Matthew Bender).
Ch. 23, *Attachment*.
Ch. 30, *Bankruptcy*.

Collier On Bankruptcy (Matthew Bender).

Collier Bankruptcy Practice Guide, Ch. 3, *Nonbankruptcy Alternatives* (Matthew Bender).

Rabkin & Johnson, Current Legal Forms with Tax Analysis (Matthew Bender).
Ch. 5A, *Creditors' Agreements*.

Ch. 5B, *Assignments and Powers of Attorney*.

Debtor-Creditor Law, Ch. 24, *Assignments for the Benefit of Creditors* (Matthew Bender).

Warren's Forms of Agreements, Ch. 36, *Agreements Among Creditors* (Matthew Bender).

[2] Additional Text References

Witkin, Summary of California Law, vol. 1, *Contracts*, §§ 710-711 (assignment for benefit of creditors) (10th ed. 2005).

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts Law
Debtor & Creditor Relations



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27-78 California Legal Forms--Transaction Guide §§ 78.08-78.09

AUTHOR: John A. Vos, Practice Consultant

[Reserved]

§§ 78.08[Reserved]



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27-78 California Legal Forms--Transaction Guide § 78.10

AUTHOR: John A. Vos, Practice Consultant

§ 78.10 Debtor's Financial Position

Under the Commercial Code, a debtor is deemed insolvent if the debtor either [Com. Code § 1201(23)]:

- Has generally ceased to pay debts in the ordinary course of business (other than as a result of a bona fide dispute);
- Is unable to pay debts as they become due; or
- Is insolvent within the meaning of federal bankruptcy law.

The Federal Bankruptcy Code defines insolvency as a condition in which the sum of a debtor's debts is greater than all of the debtor's property, at a fair valuation, exclusive of property transferred, concealed, or removed with intent to hinder, delay, or defraud creditors and property that is exempt from liability for the debts under the Bankruptcy Code [see 11 U.S.C. § 101(32)(A); see also 11 U.S.C. §§ 101(32)(B), 522 (definition with respect to partnerships; exempt property)].

Whether or not a debtor's financial condition qualifies it as insolvency under a statutory definition, financial difficulties may force the debtor to take immediate action to pay matured debts. In other situations, contingent unliquidated claims may loom so large that the business owners do not see an efficient way to handle all the prospective claims. In either case, the debtor must decide whether to continue the business or to discontinue the business, liquidate its assets, and distribute the proceeds among the debtor's creditors. This initial decision depends largely on the degree and severity of the financial problems and related factors, such as the amount and type of the debtor's assets and liabilities. For considerations relevant to the assessment of a debtor's general financial condition, see § 78.110.

- A distressed debtor may attempt to continue the business through the use of a creditors' agreement [see § 78.12] or a Chapter 11 reorganization under the Bankruptcy Code [see 11 U.S.C. § 1101 et seq.; see also § 78.15[4]]. Any decision to continue a business and to obtain rehabilitative help should be

based on a favorable analysis of the debtor's financial condition, current management, and other factors [see § 78.111]. The creditors' willingness to grant concessions as to the payment period or the amount of the debt also is essential [see § 78.12[1]].

- An assignment for the benefit of the creditors (sometimes referred to in shorthand reference as an "ABC") is a common nonbankruptcy method used to discontinue the debtor's business, liquidate its assets, and distribute the assets to creditors [see § 78.13]. The bankruptcy alternative is Chapter 7 liquidation [see § 78.15[5]].

Certain property of an individual debtor is exempt from all procedures for the enforcement of a money judgment [see CCP § 703.010 *et seq.*] except the enforcement, under certain circumstances, of a judgment for the foreclosure of a mortgage, deed of trust, or other lien or encumbrance on the property [CCP § 703.010; see *California Forms of Pleading and Practice*, Ch. 254, *Executions and Enforcement of Judgments*, § 254.10 *et seq.* (Matthew Bender)]. The exemptions apply only to a natural person [CCP § 703.020(a)]. Because these exemptions control in a federal bankruptcy case [11 U.S.C. § 522(b)(1); CCP § 703.130], the debtor may elect to claim as exempt either of the following types of property in the event of a bankruptcy proceeding:

- The property that is subject to the foregoing exemptions from money judgments in general [see CCP § 703.010 *et seq.*]; or
- Other property listed in CCP § 703.140(b) [see *California Forms of Pleading and Practice*, Ch. 307, *Insolvency* (Matthew Bender)], which is substantially similar to property exempted under the Bankruptcy Code [see 11 U.S.C. § 522].

Legal Topics:

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

Commercial Law (UCC)Sales (Article 2)General OverviewContracts LawDebtor & Creditor Relations



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27-78 California Legal Forms--Transaction Guide § 78.11

AUTHOR: John A. Vos, Practice Consultant

§ 78.11 Advantages and Disadvantages of Nonbankruptcy Relief

A debtor desiring to continue in business may prefer a nonbankruptcy agreement with creditors instead of a Chapter 11 reorganization because there is a stigma associated with bankruptcy, which would hinder future dealings with suppliers and service providers, notwithstanding attempts by the government to remove such a stigma [see Collier Bankruptcy Practice Guide, Ch. 3, *Nonbankruptcy Alternatives* (Matthew Bender)]. Higher administration costs and inefficient and slow administration are additional drawbacks to bankruptcy. An out-of-court agreement can afford flexibility to both the debtor and the creditors, which would not attend a bankruptcy reorganization plan since the Bankruptcy Code establishes its own priorities, and they may not necessarily best serve the interests of the debtor or the creditors. On the other hand, Chapter 11 reorganizations offer the potential for a more substantial restructuring of a distressed debtor's finances and the advantage of supervised enforcement [see § 78.15[4]].

PRACTICE TIP:

Bankruptcy is not always a low budget experience for the debtor. Expenses of administration for a Chapter 11 case typically include significant attorneys' fees as well as quarterly payments based on cash flow (not profits) to the United States Trustee Program. Many times a reorganization may more efficiently be worked out with amenable creditors in an ABC. *Commentary by John A. Vos.*

For a debtor who intends to go out of business, the same considerations apply to an out-of-court liquidation of assets (for example, an assignment for the benefit of creditors) when compared to a Chapter 7 liquidation under the Bankruptcy Code. Additionally, higher prices usually can be realized on the nonjudicial sale of assets, since the liquidation can be conducted in a more gradual, commercially reasonable manner [see Collier Bankruptcy Practice Guide, Ch. 3, *Nonbankruptcy Alternatives* (Matthew Bender)].

Certain secured creditors may be concerned about losing their collateral in a bankruptcy proceeding by having it avoided as a preferential transfer [see 11 U.S.C. § 547; see also § 78.111]. Further, a bankruptcy proceeding may leave secured creditors with a discharged claim for a deficiency or faced with delayed collection or reduction of the claim.

PRACTICE TIP:

In today's climate certain assumptions are made by the participants in a bankruptcy proceeding, because bankruptcy reorganizations and liquidations are more and more common. On the other hand, since assignments for benefit of creditors are less frequent, counsel is freer in an ABC to write on fresh canvas.
Commentary by John A. Vos.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawDebtor & Creditor Relations



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27-78 California Legal Forms--Transaction Guide § 78.12

AUTHOR: John A. Vos, Practice Consultant

§ 78.12 Creditors' Agreements

[1] Obstacles to Implementation

[a] Dissenting Creditors

A critical requirement for the effectiveness of an out-of-court agreement with creditors is that substantially all of the creditors have to accept the agreement. Dissenting creditors may effectively abort the agreement by filing an involuntary bankruptcy petition against the debtor or by initiating other creditor actions. Further, the debtor should not bother pursuing an out-of-court procedure if it is obvious that the debtor will need to rely on the unique enforcement powers of the Bankruptcy Code to effect the desired reorganization (for example, to avoid the effect of insolvency clauses or to defer payment of unsecured tax claims) [*see* § 78.111; *see also* Collier Bankruptcy Practice Guide, Ch. 3, *Non-bankruptcy Alternatives* (Matthew Bender)].

[b] Claims Given Priority Under State or Federal Law

The existence of claims given priority by state or federal law [*see* 31 U.S.C. § 3713; *but see* *United States v. Estate of Romani* (1998) 523 U.S. 517, 534 (unrecorded federal tax lien did not have priority pursuant to 31 U.S.C. § 3713 over judgment lien that had been perfected under Pennsylvania law; federal Tax Lien Act, rather than federal priority statute, was governing statute when government claimed preference in delinquent taxpayer's insolvent estate); *see also* § 78.230] or secured claims poses a major obstacle to effecting an out-of-court settlement. Priority claims may cover federal or state taxes [*see* I.R.C. §§ 6321, 6322; R&T Code § 19253], wages and contributions to employee benefit plans [*see* CCP § 1204 *et seq.*], unemployment and disability insurance contributions [*see* UI Code § 1701], sales and use taxes [*see* R&T Code § 6756], bank and corporation taxes [*see* R&T Code § 19253], and consumer deposits [*see* CCP § 1204.5]. The priorities of security interests are determined by statute [*see* *Com. Code* § 9301 *et seq.*].

[c] Secured Claims

The debtor may also have claims secured by, among other things, an assignment of accounts receivable, conditional

sales agreement, deed of trust on real property, or trust receipts. Unless unsecured creditors are assured that the debtor has adequately satisfied or disposed of priority and secured claims, they generally will not enter into an out-of-court arrangement.

[2] Types of Agreements

[a] Extension Agreement

Under an extension agreement, the debtor is required to pay the full amount of each debt but is granted additional time to do so [see §§ 78.200-78.204]. This type of agreement is generally appropriate when the debtor is having temporary financial difficulties but is realistically likely to resolve the difficulties with additional time. The agreement may require payment in a series of installments or in one lump sum at the end of the extended period. Installment payments may begin immediately on execution of the agreement or at a later time agreed on by the parties. The mutuality of agreement to extend the time of payment of a matured obligation constitutes good consideration [see *Bank of America Nat'l Trust & Sav. Asso. v. Hollywood Improv. Co.* (1941) 46 Cal. App. 2d 817, 821].

[b] Composition Agreement

A composition agreement, also known as a compromise agreement, provides for the cash payment of a reduced percentage of the total amount of a creditor's claim [see § 78.205]. The agreed percentage is uniform among all of the creditors joining in the agreement. The debtor usually pays the scaled-down debts at once on execution of the agreement. This type of agreement is generally appropriate for a moderate-to-serious insolvency, when a simple extension would not suffice and the debtor has reasonable prospects for recovery if relieved of a portion of the present heavy liabilities. This remedy may be particularly appropriate in the case of a competent debtor who has suffered permanent loss of value in inventory and receivables because of conditions beyond the debtor's control, such as flood, riot, or other disaster.

[c] Combination Agreement

Under a combination settlement agreement (which combines the features of extension and composition agreements), the claims of creditors are uniformly scaled down by an agreed percentage, part of the reduced indebtedness is paid in cash on execution of the agreement, and the remainder, usually evidenced by notes, is payable over an extended period of time in installments [see § 78.220].

PRACTICE TIP:

Suppose, for example, that the owners of a business believe that they have good prospects for the future, but are suffering temporary cash flow problems and need an infusion of new capital, and that the new investors are unwilling to assume liability for the old debt or of a business suffering from what the new investors believe to be too much debt. This is a situation in which the business opportunity may be worth more "alive than dead," and be well suited to an ABC. An agreement may be proposed for new money to be invested, partly to pay down the prior debt to a level satisfactory to the new investors and partly for future working capital, subject to the agreement of the bulk of the existing creditors, who may be willing to take some or all present payment on account. *Commentary by John A. Vos.*

[3] Initiation and Negotiation

A nonbankruptcy, out-of-court rehabilitation plan for the debtor may be initiated by the debtor or a major creditor, or by a group of creditors. Debtor-initiated plans are usually handled through the debtor's attorney, who consults with at least the largest of the creditors and arranges a meeting between the debtor and some of the creditors. As a general rule, the debtor and attorney should invite to this meeting no more than 10 creditors holding at least 20 percent of the general unsecured debt and all creditors with substantial claims who support the debtor's rehabilitation efforts [see Collier

Bankruptcy Practice Guide, Ch. 3, *Non-bankruptcy Alternatives* (Matthew Bender)].

The debtor's attorney and accountant should attend the initial meeting and present the current financial statements of the business to the creditors. The debtor should be prepared to respond to questions from the creditors regarding the financial history of the business and the reasons for its distressed condition. The creditors may require an independent appraisal of the current business inventory or other information if the information is not forthcoming from the debtor. In deciding whether to accept an out-of-court reorganization plan for the debtor, creditors may be particularly interested in what amount a forced sale of the debtor's assets would yield. They may view this amount as the minimum they would be willing to accept under a nonbankruptcy plan.

PRACTICE TIP:

Frequently the debtor does not understand the needs of the creditors. The debtor is emotionally invested in the business, and sees value to the intangibles, whereas the creditors are more concerned with a return on their hard asset investments. The job of good counsel is to help both sides in understanding the perspectives of the other. *Commentary by John A. Vos.*

[4] Creditors' Committees

The creditors, unless they are relatively few, usually act through a committee or an agent in executing the terms of a work-out agreement. The agreement typically contains detailed provisions governing the powers and duties of the committee or agent. Members of a committee organized by creditors before the commencement of a bankruptcy reorganization case may serve as the committee in the ensuing bankruptcy case if the committee was fairly chosen and is representative of the different kinds of claims to be represented [*see 11 U.S.C. § 1102(b)(1)*]. For a list of the standards used to determine whether the committee is representative and was fairly chosen, see § 78.121.

[5] Effect in Ensuing Chapter 11 Reorganization

Creditors who accept or reject the terms of a debtor's rehabilitation plan or agreement prior to a Chapter 11 reorganization [*see § 78.15[4]*] are deemed to have accepted or rejected a bankruptcy plan containing the same provisions [*see § 78.15[4][d]*] if the solicitation of acceptances or rejections by creditors complied with any applicable nonbankruptcy law, rule, or regulation governing the adequacy of disclosure in connection with the solicitation [*11 U.S.C. § 1126(b)*].

If there is no such law, rule, or regulation, the result is the same as long as the acceptances or rejections were solicited after disclosure of "adequate information" [*11 U.S.C. § 1126(b)*]. Adequate information is information of a kind, and in sufficient detail as far as is reasonably practicable in light of the nature and history of the debtor and the condition of the debtor's books and records, including a discussion of the potential material federal tax consequences of the plan to the debtor, any successor to the debtor, and a hypothetical investor typical of the holders of claims or interests in the case, that would enable such a hypothetical investor to make an informed judgment about the plan. Adequate information need not include such information about any other possible or proposed plan. In determining whether a disclosure statement provides adequate information, the court must consider the complexity of the case, the benefit of additional information to creditors and other parties in interest, and the cost of providing additional information [*11 U.S.C. § 1125(a)(1)*]. An investor "typical of holders of claims or interests of the relevant class" is an investor having a claim or interest of the relevant class; having the type of relationship with the debtor that the holders of other claims or interests of the class generally have; and having the ability generally possessed by holders of claims or interests in the class to obtain adequate information from sources other than the written disclosure statement regarding the bankruptcy plan required by the Bankruptcy Code [*11 U.S.C. § 1125(a)(2)*] (note that although Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 [P.L. 109-8] modified the "hypothetical reasonable investor" standard to that stated in the text above, the definitional section cited in this sentence was not similarly modified)).

PRACTICE TIP:

Even when the debtor and counsel see Chapter 11 as inevitable, exploring an ABC with key creditors will provide a useful sense of the concerns of the creditors, and may serve as a foundation for communication during the Chapter 11 process. In addition, in this situation, exploring an ABC with key creditors who will vote affirmatively on an ABC which is consistent with a plan later to be filed in the subsequent bankruptcy will lock up those key votes, which may be needed for confirmation of the Chapter 11 plan. *Commentary by John A. Vos.*

Legal Topics:

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

Contracts LawDebtor & Creditor RelationsContracts LawTypes of ContractsGeneral Overview



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DIVISION V: CONTRACTS AND OBLIGATIONS
CHAPTER 78 CREDITORS' AGREEMENTS: NONBANKRUPTCY ALTERNATIVES
PART II. LEGAL BACKGROUND

27-78 California Legal Forms--Transaction Guide § 78.13

AUTHOR: John A. Vos, Practice Consultant

§ 78.13 Assignment for Benefit of Creditors

[1] In General

[a] Nature and Purpose of Assignment

An assignment for the benefit of creditors (or simply "ABC") is a business liquidation device available as an alternative to a Chapter 7 liquidation under the Bankruptcy Code [*see 11 U.S.C. § 701 et seq.*]. The debtor transfers assets to an assignee for the benefit of the creditors, and the assignee sells the assets and distributes the proceeds to the creditors [*see Bumb v. Bennett (1958) 51 Cal. 2d 294, 298-299*].

The assignment typically is made with a view to the immediate sale of the assigned assets. The sale may take place as soon as the assets are inventoried, secured, and insured (as appropriate), or after completion of any work in progress. The completion of work in progress may increase the value of the assets or avoid any liabilities for noncompletion when the work is the subject of contract.

The assignee frequently is a person who normally acts as a trustee in bankruptcy. Except to finish work in progress, trustees generally are reluctant to accept an assignment to operate the business for any period.

PRACTICE TIP:

Generally bankruptcy trustees are skilled in liquidating assets, and are paid a percentage of monies realized by the creditors. *Commentary by John A. Vos.*

Assignments for the benefit of creditors usually are handled predominantly by large creditors' associations and by attorneys who specialize in the field.

[b] Secured, Priority Unsecured, and Other Unsecured Claims

In inventorying the debtor's property and ascertaining the validity, nature, and extent of the claims of creditors, the

assignee must necessarily ascertain the claims, if any, that are secured, the items of property affected by the secured claims, the unsecured claims that have preference, and the order of priority of the unsecured claims. Items subject to secured claims are generally either sold subject to the claims or included in the assignee's general sale (by arrangement with the secured creditors). In the latter case, the proceeds normally would be segregated to enable the secured creditors to assert their claims against the proceeds from the sale.

[c] Sale of Assets

The debtor's assets generally are liquidated through a public sale conducted by or at the direction of the assignee, with adequate advertising to ensure competitive bidding. A sale under an assignment for the benefit of all creditors is excepted from the bulk transfers division of the Commercial Code [*Com. Code* § 6101 *et seq.*], as is the original assignment [*Com. Code* § 6103(c)(6); *see* § 78.230[1][j]]. Further, sale of accounts receivable as part of the sale of a business, and assignment of accounts for the purpose of collection, are excepted from the secured transactions division of the Commercial Code [*Com. Code* § 9109(d)(4), (5); *see Com. Code* § 9101 *et seq.* (secured transactions division)].

[d] Distribution of Proceeds

The assignee may distribute the proceeds from the liquidation of assets either in increments or in one distribution. Any distribution is rarely made before expiration of 120 days after the assignment, however, because of the possibility that nonassenting creditors may file an involuntary petition within that period [*see 11 U.S.C. § 303(h)(2)*].

[e] Assignment for Fewer Than All Creditors

An assignment for the benefit of creditors may be for the benefit of all of a debtor's creditors [*see Sabichi v. Chase* (1895) 108 Cal. 81, 86, *overruled on another point*, *Bumb v. Bennett* (1958) 51 Cal. 2d 294, 300, 333 P. 2d 23] or for the benefit of only particular creditors [*see Bumb v. Bennett* (1958) 51 Cal. 2d 294, 298-300; *Jarvis v. Webber* (1925) 196 Cal. 86, 96-99]. Since an insolvent debtor may lawfully pay some creditors to the exclusion of others by way of a direct transfer [*see CC* § 3432], the debtor may do the same by way of a transfer in trust. In the absence of fraud, an assignment for the benefit of a particular class of creditors, and to any other creditors that have assented to its terms, effectively postpones the nonconsenting creditors in favor of the claims of the consenting creditors [*see Bumb v. Bennett* (1958) 51 Cal. 2d 294, 300; *Brainard v. Fitzgerald* (1935) 3 Cal. 2d 157, 163 (in absence of fraud, assignment limited to particular class of creditors prevails over subsequent attachment or execution)].

PRACTICE TIP:

The lesson here is that good creditor's counsel needs to be diligent in making sure that the debtor and a subset of creditors are not selling off assets or compromising value of the business. Depending on the size of the account, frequent contact with the debtor and assurances of its financial condition may be warranted. *Commentary by John A. Vos.*

[f] Assignment Under Attachment Law

The Attachment Law [*CCP* § 481.010 *et seq.*] provides for the termination of the lien of a temporary protective order or of attachment on the making of a general assignment for the benefit of creditors [*see* § 78.230[1][c]]. This statutory procedure applies to liens created within 90 days before the making of the assignment [*see CCP* § 493.030]. To terminate a lien, the assignment must be a general assignment for the benefit of creditors and must do all of the following [*CCP* § 493.010]:

- Assign all of the debtor's assets that are transferable and not exempt from enforcement of a money judgment [*see* § 78.10];
- Be for the benefit of all of the debtor's creditors; and

- Not itself create a preference of one creditor or class of creditors over any other creditor or class of creditors [*but see CCP § 493.010(c)*](assignment may recognize existence of preferences to which creditors are otherwise entitled)].

[2] General Effects on Debtor's Property

[a] Exempt Property

In a general assignment for the benefit of creditors that meets the requirements of *CCP § 493.010*[*see [1][f], above*], the assignor, if an individual, may choose to retain property that is otherwise exempt from the enforcement of money judgments [*see CCP § 703.010 et seq.; see also California Forms of Pleading and Practice, Ch. 254, Executions and Enforcement of Judgments, § 254.10 et seq. (Matthew Bender)*] or is listed in *CCP § 1801* [*CCP § 1801; see California Forms of Pleading and Practice, Ch. 307, Insolvency (Matthew Bender)*], which lists essentially the same property that is exempt in bankruptcy proceedings [*see 11 U.S.C. § 522*].

[b] Divestment of Debtor's Interests

An assignment for the benefit of creditors must vest all interest in the transferred property in the assignee [*see Brainard v. Fitzgerald (1935) 3 Cal. 2d 157, 163 ; Mechanics Bank of Richmond v. Rosenberg (1962) 201 Cal. App. 2d 419, 424, 20 Cal. Rptr. 202*]. However, a reservation to the debtor, in the assignment, of any surplus remaining after the creditors have been paid does not invalidate the assignment, since the assignee would hold the excess as trustee for the debtor whether or not the instrument provides for this handling of the surplus [*Heath v. Wilson (1903) 139 Cal. 362, 368-369*].

[c] Conveyance of Real Property

An assignment of real property for the benefit of creditors that purports to pass all interest of the debtor is a conveyance [*see CC § 1215*] subject to the Civil Code provisions governing transfers of real property [*Moore v. Schneider (1925) 196 Cal. 380, 389-392 ; see CC § 1039 et seq.; see also Ch. 27, Deeds and Recording*]. However, failure to record such a transfer does not render the conveyance invalid against a subsequently attaching creditor, since an unrecorded deed or assignment is sufficient to pass title against such a creditor [*Bumb v. Bennett (1958) 51 Cal. 2d 294, 299-300*]. (Recording an assignment would impart constructive notice to bona fide purchasers when other interests are transferred [*see CC §§ 1213-1215; see also § 78.230[1][j]*].)

PRACTICE TIP:

The preferred practice is to record the title transfer. An unrecorded deed may be subject to defeasance by a trustee in a subsequent bankruptcy proceeding. *11 U.S.C. § 547. Commentary by John A. Vos.*

PRACTICE TIP:

An assignee may be held liable for potential environment issues, and would be wise before accepting the assignment to determine whether a Phase I environmental study has been prepared. For general discussion, see Ch. 33, *Contamination Considerations in Real Property Transactions. Commentary by John A. Vos.*

[d] Transfer of Personal Property

Generally, if a transfer of personal property is not accompanied by immediate delivery and followed by an actual and continued change of possession of the property, it is void against the transferor's creditors and against bona fide purchasers [*CC § 3440(a); see CC § 3440 et seq. (governing conveyances of personal property without delivery)*]. This limitation does not apply, however, to an assignment made for the benefit of creditors generally or by the assignee

acting under an assignment for the benefit of creditors generally [see CC §§ 3440(b), 3440.1(e)].

PRACTICE TIP:

The preferred practice is to file the title transfer with the California Secretary of State. An unrecorded transfer may be subject to defeasance by a trustee in a subsequent bankruptcy proceeding. See 11 U.S.C. § 547. *Commentary by John A. Vos.*

[3] Parties Bound by Assignment

A common law assignment for the benefit of creditors is binding on the debtor and all creditors who assent to it [*Peterson v. Ball* (1931) 211 Cal. 461, 468]. It vests the debtor's title to the property in the assignee and is, at most, void only against creditors not assenting to it and against good faith purchasers and encumbrancers for value [*Garn v. Thorwaldson* (1919) 40 Cal. App. 62, 66]. The acceptance of the assignment by the creditors is presumed until the contrary is shown. Although nonacceptance by any particular creditor may result in the assenting creditors having preference over the nonassenting creditor, this is not fatal to the assignment, since preferences are not illegal [*Brainard v. Fitzgerald* (1935) 3 Cal. 2d 157, 163, 44 P. 2d 336 (citing former CC § 3451); see CC § 3432].

[4] Assignee's Rights and Duties

[a] In General

The assignee for the benefit of creditors takes only the interest of the debtor in and to the property and can assert only those claims to the property that were available to the debtor [*Moore v. Schneider* (1925) 196 Cal. 380, 385-386]. The assignee has the duties of a trustee acting for the benefit of creditors in accordance with the assignment [*Mechanics Bank of Richmond v. Rosenberg* (1962) 201 Cal. App. 2d 419, 424-425].

[b] Right to Set Aside Fraudulent Transfer

The assignee of a general assignment for the benefit of creditors [see CC § 493.010 (definition); see also [1][f], above] may exercise any or all of the rights provided by statute [see CC § 3439.07] for recovery of property transferred in violation of the Uniform Fraudulent Transfer Act [CC § 3439 *et seq.*] if they are available to any of the creditors who are beneficiaries of the assignment [CC §§ 3439.06(d), 3440; see § 78.230[1][f]].

[c] Right to Recover Preferential Transfers

Under CCP § 1800, property transferred preferentially by the debtor prior to making an assignment for the benefit of creditors may be recovered by the assignee under specified circumstances [see CCP § 1800(b); see also *Blonder v. Cumberland Engineering* (1999) 71 Cal. App. 4th 1057, 1063-1064, 84 Cal. Rptr. 2d 216 (CCP § 1800(b) does not require showing of benefit to bankruptcy estate in order to avoid preferential security interest); for additional discussion, see § 78.230[1][d]]. CCP § 1800 is not preempted by the Bankruptcy Code [*Haberbush v. Charles & Dorothy Cummins Family Limited Partnership* (2006) 139 Cal. App. 4th 1630, 1640, 43 Cal. Rptr. 3d 814 ; accord, *Credit Managers Assn. v. Countrywide Home Loans, Inc.* (2006) 144 Cal. App. 4th 590, 598-600, 50 Cal. Rptr. 3d 259 ; contra, *Sherwood Partners, Inc. v. Lycos, Inc.* (9th Cir. 2005) 394 F.3d 1198, 1202-1206] .

PRACTICE TIP:

There may be occasions when nonconsenting creditors to an ABC may wish to file an involuntary bankruptcy proceeding against the debtor in order to obtain jurisdiction over the transferred assets and have a forum for recovery of the preferential transfers. See 11 U.S.C. § 547. *Commentary by John A. Vos.*

[5] Priority Claims

Claims for wages and employee benefit contributions, among other claims, have priority following an assignment for the benefit of creditors [see, e.g., 31 U.S.C. § 3713; CCP § 1204; but see *United States v. Estate of Romani* (1998) 523 U.S. 517 (unrecorded federal tax lien did not have priority pursuant to 31 U.S.C. § 3713 over judgment lien perfected under state law; federal Tax Lien Act, rather than federal priority statute, was governing statute when government claimed preference in delinquent taxpayer's insolvent estate); see also § 78.230[1][g]].

[6] Effect on Bankruptcy Proceeding

A general assignment for the benefit of creditors in itself sustains a nonassenting creditor's involuntary bankruptcy petition filed within 120 days of the making of the assignment [see 11 U.S.C. § 303(h)(2)]. However, if the assignment is being properly administered and no sufficient showing is made in the bankruptcy court that resort to the avoidance powers under the Bankruptcy Code is necessary to protect the material rights of creditors, the debtor or any assenting creditor may challenge the involuntary petition and urge its dismissal pursuant to the abstention doctrine [see 11 U.S.C. § 305(a); see Collier Bankruptcy Practice Guide, Ch. 3, *Non-bankruptcy Alternatives* (Matthew Bender)].

Even if the debtor timely challenges the involuntary petition, the bankruptcy court may issue an order for relief against the debtor if the debtor is generally not paying undisputed debts as they become due, or within 120 days before the date of the filing of the petition, a custodian (other than a trustee, receiver, or agent appointed or authorized to take charge of less than substantially all of the property of the debtor for the purpose of enforcing a lien against the property) was appointed or took possession [11 U.S.C. § 303(h)]. For these purposes, "custodian" includes an assignee under a general assignment for the benefit of the debtor's creditors [11 U.S.C. § 101(11)(B)].

[7] Discharge of Debtor

An assignment for the benefit of creditors and the payment of dividends under the assignment ordinarily do not act as a discharge of the debtor, except to the extent that the claims of the creditors are thereby reduced by actual payment. However, the assignment agreement will often provide that the debtor will be released from further liability. This condition in an assignment is binding on creditors who accept the benefits of the assignment [*Boteler v. Robinson* (1930) 105 Cal. App. 611, 615 ; *Equitable Life Assurance Soc. v. Jacobson* (1924) 68 Cal. App. 717, 722].

If the debtor is released from further liability to a particular creditor, any lien or other security held by the creditor for the released claim normally cannot continue to exist [*Equitable Life Assurance Soc. v. Jacobson* (1924) 68 Cal. App. 717, 722]. However, a security agreement in which such a creditor retains title to the property until the underlying debt is fully discharged would not be affected by the creditor's promise to release the debtor, since in the absence of a contrary intention, the assignment ordinarily does not include property retained by the creditor as security [see *Stoody Co. v. Valley Pipe & Welding Co.* (1937) 20 Cal. App. 2d 580, 586-587 (creditor has right to recover property sold under conditional sales contract)].

PRACTICE TIP:

This would be a good situation for debtor's counsel to negotiate for a release of the lien. *Commentary by John A. Vos.*

Legal Topics:

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

Contracts LawDebtor & Creditor RelationsContracts LawPerformanceAssignmentGeneral OverviewContracts LawTypes of ContractsGeneral Overview



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PART II. LEGAL BACKGROUND

27-78 California Legal Forms--Transaction Guide § 78.14

AUTHOR: John A. Vos, Practice Consultant

§ 78.14 Tax Consequences

[1] For Debtor

[a] General Rule

When a creditor agrees to a compromise (that is, a reduced payment of a debt by the debtor), the general rule is that the debtor realizes income on the cancellation of the debt, in the amount of the difference between the amount paid and the face amount of the obligation [*Callan Court Co. v. Commissioner* (1965) *T.C. Memo. 1965-261*]. The theory on which the rule is based is that the reduction of the debt increases the net worth of the debtor. The general rule is subject to exceptions, some of which are summarized in [b]-[d], below. For further discussion of the exceptions, see Rabkin & Johnson, *Current Legal Forms with Tax Analysis*, Ch. 5A, *Creditors' Agreements* (Matthew Bender).

[b] Voluntary Forgiveness of Debt

No income is realized when the debt cancellation is a gift arising out of voluntary forgiveness by the creditor [*Helvering v. American Dental Co.* (1943) 318 U.S. 322, 331]. If partial payment is made, the controlling question of fact appears to be whether the creditor has released part of the claim for nothing, or whether the creditor is relinquishing the entire debt for the best price obtainable [see *Commissioner v. Jacobson* (1949) 336 U.S. 28]. Case law indicates that strict limitations apply to the gift exception [see, e.g., *Marshall Drug Co. v. United States* (Ct. Cl. 1951) 95 F. Supp. 820, 118 Ct. Cl. 532].

[c] Reduction of Cost

A recognized exception to the rule that a debtor realizes income on a debt reduction exists under certain circumstances for debts incurred to purchase property. When the debt reduction is a transaction between the debtor and a seller (as creditor), which the parties intend to operate as an adjustment of the cost of property that the debtor is buying, this intention is given effect, and no income is realized [*Borin Corp. v. Commissioner* (6th Cir. 1941) 117 F.2d 917]. A seller's reduction of a purchase money debt for a solvent debtor is a purchase price adjustment [see *I.R.C. § 108(e)(5)*].

[d] Insolvent Debtor

A debtor does not realize income on a cancellation of indebtedness when the debtor remains insolvent after the cancellation [see *Dallas Transfer & Terminal Warehouse Co. v. Commissioner* (5th Cir. 1934) 70 F.2d 95 ; see also *Commissioner v. Jacobson* (1949) 336 U.S. 28, 51 (this exemption does not apply to debtor who is merely in straitened financial circumstances, when debtor's net worth and prospective income establish that debtor is solvent)]. If the cancellation of debt is to take effect at some future date, the debtor's insolvency is to be determined as of the later date, not the date of the executory agreement [*Walker v. Commissioner* (5th Cir. 1937) 88 F.2d 170].

PRACTICE TIP:

Good counsel will involve the debtor's accountant in review of the proposed ABC to make sure, among other things, that the assignment does not leave the debtor with no assets but a lingering tax obligation arising out of the ABC. *Commentary by John A. Vos.*

[2] For Creditor

Statutory rules determine whether or not a creditor can deduct a bad debt [see *I.R.C. § 166(a)(1), (2)*]. The general statutory rule is that a debt that becomes worthless within a taxable year is deductible from gross income. To the extent that a debt becomes partially worthless in a given taxable year, the portion actually charged off as worthless by the taxpayer for that taxable year is deductible. If a creditor accepts partial payment of a debt in cash or property, the difference between the creditor's basis in the debt and the lesser amount received or the lesser value of the property received is deductible as a bad debt [see *Commissioner v. Sisto Financial Corp.* (2d Cir. 1943) 139 F.2d 253]. For further discussion of the requirements for bad debt deductions as they relate to creditors' agreements, see Rabkin & Johnson, *Current Legal Forms with Tax Analysis*, Ch. 5A, *Creditors' Agreements* (Matthew Bender).

Legal Topics:

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

Contracts LawDebtor & Creditor RelationsContracts LawTypes of ContractsGeneral OverviewTax LawFederal Income Tax ComputationSales & ExchangesBasis (IRC secs. 1011-1017, 1019, 1021, 1023)Discharges of Indebtedness



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27-78 California Legal Forms--Transaction Guide § 78.15

AUTHOR: John A. Vos, Practice Consultant

§ 78.15 Bankruptcy Law

[1] Bankruptcy Code

Title 11 of the United States Code contains the principal federal bankruptcy laws and is generally referred to as the Bankruptcy Code [see Pub. L. No. 95-598, 92 Stat. 2549]. The three principal chapters of the code, which outline the specific bankruptcy procedures available to private individuals, organizations, and corporations [see H.R. Rep. 95-595, 95th Cong., 1st Sess., 321 (1977); S. Rep. 95-989, 95th Cong., 2d Sess., 31 (1978)], are Chapter 7 covering liquidation [11 U.S.C. § 701 *et seq.*], Chapter 11 covering business reorganization [11 U.S.C. § 1101 *et seq.*], and Chapter 13 covering adjustment of debts for wage earners [11 U.S.C. § 1301 *et seq.*].

A debtor commences a voluntary bankruptcy proceeding by filing a petition with the appropriate bankruptcy court pursuant to the procedure set forth in one of the chapters of the Bankruptcy Code [see 11 U.S.C. § 301(a)]. Each chapter provides a remedy for a particular kind of bankruptcy case. Chapter 7 provides for the liquidation of any debtor's assets to pay creditors. Chapter 11 provides for the reorganization and rehabilitation of a distressed business enterprise by adjusting its debts and equity interests. Chapter 13 permits an individual with sufficiently stable and regular income to discharge an adjusted schedule of debts by making regular payments through a trustee.

The Judicial Conference of the United States adopted and maintains procedural rules (the Federal Rules of Bankruptcy Procedure) and official bankruptcy forms for use in bankruptcy cases and proceedings [28 U.S.C. § 2075].

[2] Priorities

The Bankruptcy Code sets forth a mandatory order of priority for the payment of expenses and claims. The following expenses and claims have priority in the following order [11 U.S.C. § 507(a)]:

- First: claims for debts to a spouse, former spouse, or child for alimony or support [11 U.S.C. § 507(a)(1)];

- Second: expenses of administration [*11 U.S.C. § 507(a)(2); see 11 U.S.C. § 503(b); 28 U.S.C. § 1911 et seq.* (fees and costs)];

- Third, in involuntary cases: unsecured claims arising in the ordinary course of the debtor's business after commencement of the bankruptcy case but before the appointment of a trustee or the order for relief, whichever is earlier, if the claims would otherwise have been allowed [*11 U.S.C. § 507(a)(3); see 11 U.S.C. § 502(f)*];

- Fourth: wages, salaries, and certain sales commissions, up to a statutory maximum [*11 U.S.C. § 507(a)(4); see CCP §§ 1204(a), 1205*];

- Fifth: contributions to employee benefit plan, up to a statutory maximum [*11 U.S.C. § 507(a)(5); see CCP § 1204(b)*];

- Sixth: certain unsecured claims (up to a statutory maximum) of persons engaged in the production or raising of grain and of persons engaged in commercial fishing [*11 U.S.C. § 507(a)(6); see 11 U.S.C. § 557(b)*];

- Seventh: claims of individuals (up to a statutory maximum) arising from the deposit of money in connection with the purchase, lease, or rental of property, or purchase of services, for personal, family, or household use, that were not delivered or provided [*11 U.S.C. § 507(a)(7); see CCP § 1204.5*];

- Eighth: federal and state claims [*11 U.S.C. § 507(a)(8); see CCP § 1204.5; see also R&T Code § 19253*];

- Ninth: unsecured claims based on commitments by the debtor to specified federal banking organizations to maintain the capital of an insured depository institution [*11 U.S.C. § 507(a)(9)*]; and

- Tenth: allowed claims for death or personal injury resulting from the operation of a motor vehicle or vessel if that operation was unlawful because the debtor was intoxicated from using alcohol, a drug, or another substance [*11 U.S.C. § 507(a)(10)*].

[3] Exempt Property

For California debtors in bankruptcy, state law determines which property of the debtor is exempt [*11 U.S.C. § 522(b)(1); CCP § 703.130*].

[4] Reorganization (Chapter 11)

[a] Advantages

The Chapter 11 reorganization procedure [*11 U.S.C. § 1101 et seq.*] is intended to rehabilitate a distressed business enterprise by restructuring its finances, thereby allowing it, through continued operation, to pay creditors, to provide employees with jobs, and to produce a return for the owners. Only an individual, a partnership, or a corporation (except one that is a governmental unit) that resides in the United States or has a domicile, a place of business, or property in the United States, may be a debtor under Chapter 11 [*11 U.S.C. §§ 101(41), 109(a)*].

Whereas an out-of-court rehabilitation plan would require nearly unanimous creditor acceptance in order to be practically effective, a Chapter 11 plan in general needs only to be accepted by creditors holding at least two thirds in amount, and more than half in number, of the allowed claims of each class of claims held by creditors [*see 11 U.S.C. §§*

1126(c), 1129(a)(8)]. A class that is not impaired under a plan, and each holder of a claim or interest of that class, will be conclusively presumed to have accepted the plan. Solicitation of acceptances is not required [11 U.S.C. § 1126(f)]. The bankruptcy court, in some cases, may relax the requirements for acceptance by creditors when the plan does not discriminate unfairly and is fair and equitable [see 11 U.S.C. § 1129(b)].

PRACTICE TIP:

A useful strategy in the appropriate case may be to have as many creditors as possible sign on to an ABC, with the debtor subsequently to file a Chapter 11 plan substantially the same as the ABC, since those creditors already have voted in favor of the debtor's plan [see § 78.12, above]. *Commentary by John A. Vos.*

Subject to limited exceptions, once the bankruptcy court approves and confirms a Chapter 11 plan, it is binding on the debtor and any equity security holder [see 11 U.S.C. § 101(16) (definition)], creditor, or general partner in the debtor, whether or not the equity security holder, creditor, or general partner has accepted the plan [see 11 U.S.C. § 1141(a)]. Further, a Chapter 11 reorganization automatically stays civil proceedings and prior judgments against the debtor [11 U.S.C. § 362(a)].

[b] Commencement Procedure

A voluntary Chapter 11 reorganization can be commenced by an entity that may be a debtor under Chapter 11 [see (a), above], by filing a petition with the bankruptcy court [11 U.S.C. § 301(a)]. In an appropriate situation, an individual debtor and spouse may jointly commence a voluntary case [11 U.S.C. § 302]. The commencement of a voluntary case under Chapter 11 constitutes an order for relief [11 U.S.C. § 301(b)]. The standards by which the court may grant an order for relief in an involuntary case are prescribed by statute [see 11 U.S.C. § 303(h)].

An involuntary case under Chapter 11 is commenced by the filing of a petition with the court against an entity that may be a debtor under Chapter 11, except that an involuntary case cannot be filed against a farmer or against a corporation that is not a moneyed, business, or commercial corporation [11 U.S.C. § 303(a)].

The filing of a petition by or against the debtor creates a bankruptcy estate comprising all of the debtor's property, with limited exceptions [see 11 U.S.C. § 541]. The court typically does not appoint a trustee in a Chapter 11 case, and the debtor is permitted to remain in possession of the bankruptcy estate and to continue operating the business. If no trustee is appointed, the debtor is a "debtor in possession" [see 11 U.S.C. § 1101(1)]. A debtor in possession has all of the rights and powers of a trustee, except the right to compensation, and has all of the duties of a trustee [see [h][i], below] except the duty to investigate [11 U.S.C. § 1107(a); see 11 U.S.C. § 1106].

PRACTICE TIP:

Counsel for the debtor should be sure to advise the debtor that the debtor acts as a fiduciary for the creditors, not just for himself or herself. *Commentary by John A. Vos.*

[c] Creditors' or Security Holders' Committee

As soon as practicable after entry of the order for relief, the United States trustee for the judicial district in which the case is pending must appoint a committee of creditors holding unsecured claims against the debtor, and may appoint any additional committees of creditors or of equity security holders that the trustee deems appropriate [11 U.S.C. § 1102(a)(1)]. On request of a party in interest, the court may order the appointment of additional committees of creditors or of equity security holders if these committees are necessary to ensure adequate representation of the creditors or of the equity security holders [11 U.S.C. § 1102(a)(2)]. On request of a party in interest in a case in which the debtor is a small business debtor and for cause, the court may order that a committee of creditors not be appointed [11 U.S.C. § 1102(a)(3)]. On request of a party in interest and after notice and a hearing, the court may order the United States trustee to change the membership of the committee, if the court determines that the change is necessary to ensure

adequate representation of creditors or equity security holders [11 U.S.C. § 1102(a)(4)].

Within a reasonable time after the order for relief, the United States trustee must convene and preside at a meeting of the creditors [11 U.S.C. § 341(a)]. The debtor must appear at this meeting and submit to examination under oath [11 U.S.C. § 343]. The trustee may convene a meeting of equity security holders as well [11 U.S.C. § 341(b)]. The court cannot preside at or attend any such meeting of equity security holders or creditors [11 U.S.C. § 341(c)].

[d] Filing and Contents of Plan

The debtor may file a reorganization plan along with the petition commencing a voluntary case, or at any time after the commencement of a case, regardless of whether it is begun on a voluntary or an involuntary basis [11 U.S.C. § 1121(a)]. A debtor remaining in possession [see *[b]*, above] has the exclusive right to file a plan for 120 days after the date of the order for relief. Any party in interest may file the plan if a trustee has been appointed [see *[h]*, below], or the debtor has not filed a plan before the expiration of the that 120-day period, or the debtor has not filed a plan that has been accepted [see *[e]*, below] before 180 days after the date of the order for relief, by each class of claims or interests that is impaired under the plan [11 U.S.C. § 1121(c)].

The reorganization plan must specify the classes of claims and interests involved in the case any class of claims or interests not impaired under the plan, and the treatment to be given any class of impaired claims or interests [11 U.S.C. § 1123(a)(1)-(3)]. The plan must provide the same treatment for each claim or interest of a particular class, unless the holder of a particular claim or interest agrees to a less favorable treatment of the particular claim or interest [11 U.S.C. § 1123(a)(4)]. The plan must provide adequate means for its implementation [11 U.S.C. § 1123(a)(5); see § 78.137]. Special requirements apply to the plan if the debtor is a corporation or if officers, directors, trustees, or successors of a debtor corporation are to be selected under the plan [see 11 U.S.C. § 1123(a)(6), (7)]. If the debtor is an individual, the plan must provide for the payment to creditors under the plan of as much (up to all) of the debtor's earnings from personal services after the commencement of the case and other future income of the debtor as is necessary for the execution of the plan [11 U.S.C. § 1123(a)(8)].

[e] Acceptance of Plan by Creditors

As a general rule, a reorganization plan must be accepted by each impaired class of claims or interests [11 U.S.C. § 1129(a)(7), (8)]. The plan is deemed accepted by a class of claims if creditors holding at least two thirds in amount, and more than half in number, of the allowed claims in that class have accepted the plan [see 11 U.S.C. § 1126(c); see also 11 U.S.C. § 1126(d) (acceptances not procured in good faith)]. The court, as part of the confirmation process [see *[f]*, below], may relax the general acceptance requirements if the plan does not discriminate unfairly and is fair and equitable with respect to each class of claims or interests of nonaccepting creditors impaired under the plan [see 11 U.S.C. § 1129(b)].

If the debtor is an individual and the holder of an allowed unsecured claim objects to confirmation of the plan, one of the following requirements must be met [11 U.S.C. § 1129(a)(15)]:

- The value, as of the effective date of the plan, of the property to be distributed under the plan on account of that claim must be not less than the amount of the claim.
- The value of the property to be distributed under the plan must be not less than the projected disposable income of the debtor [see 11 U.S.C. § 1325(b)(2) (applicable definition)] to be received during the five-year period beginning on the date the first payment is due under the plan, or during the period for which the plan provides payments, whichever is longer.

[f] Requirements for Court Confirmation

After notice, the court must hold a confirmation hearing, at which any party in interest may object to confirmation of the plan [11 U.S.C. § 1128]. Before granting confirmation, the court must determine that the plan and its proponent comply with all applicable provisions of Chapter 11 and also that the applicable statutory requirements, discussed below, have been met [11 U.S.C. § 1129(a)(1), (2)].

To be confirmed, the plan must be proposed in good faith and not by any means forbidden by law [11 U.S.C. § 1129(a)(3)]. Any payment made or to be made by the proponent, by the debtor, or by a person issuing securities or acquiring property under the plan, for services or for costs and expenses in or in connection with the case, or in connection with the plan and incident to the case, must be approved by the court as reasonable, or must be subject to that approval [11 U.S.C. § 1129(a)(4)].

The proponent of the plan must disclose the identity and affiliations of any individual proposed to serve after confirmation as a director, officer, or voting trustee of the debtor or an affiliate or successor of the debtor [11 U.S.C. § 1129(a)(5)(A)(i)]. The appointment of or continuance in office of that individual must be consistent with the interests of creditors and equity security holders and with public policy [11 U.S.C. § 1129(a)(5)(A)(ii)]. The proponent also must disclose the identity of any insider [see 11 U.S.C. § 101(31) (definition)] to be employed by the reorganized debtor, along with the compensation to be paid [11 U.S.C. § 1129(a)(5)(B)].

Any governmental regulatory commission with jurisdiction, after confirmation of the plan, over the rates of the debtor must approve any rate change provided for in the plan, or that rate change must be expressly conditioned on that approval [11 U.S.C. § 1129(a)(6)]. The plan must provide for the payment of certain preferred claims on the effective date of the plan, and for the payment of preferred tax claims over a period not exceeding six years from the date of assessment of the taxes [11 U.S.C. § 1129(a)(9)]. The plan must provide for the continuation after its effective date of payment of all retiree benefits [see 11 U.S.C. § 1114 (applicable definition)] at the level established pursuant to 11 U.S.C. § 1114(e)(1)(B) or (g), at any time prior to confirmation of the plan, for the duration of the period the debtor has obligated itself to provide those benefits [11 U.S.C. § 1129(a)(13)]. If the debtor is required by a judicial or administrative order or by statute to pay a domestic support obligation, the debtor must have paid all amounts payable under that order or statute for the obligation that first become payable after the date of the filing of the petition [11 U.S.C. § 1129(a)(14)].

All transfers of property of the plan must be made in accordance with any applicable provisions of nonbankruptcy law that govern the transfer of property by a corporation or trust that is not a moneyed, business, or commercial corporation or trust [11 U.S.C. § 1129(a)(16)].

Confirmation of the plan must not be likely to be followed by the liquidation or need for further financial reorganization of the debtor or a successor unless the liquidation or reorganization is proposed in the plan [11 U.S.C. § 1129(a)(11)]. Further, certain fees must have been paid or provided for in the plan [11 U.S.C. § 1129(a)(12); see 11 U.S.C. § 1930].

[g] Effect of Confirmation

For most purposes, the confirmation of a reorganization plan brings a Chapter 11 case to a conclusion. Generally, the provisions of a confirmed plan bind the debtor, any entity issuing securities or acquiring property under the plan, and any creditor, equity security holder, or general partner in the debtor, whether or not any of those persons is impaired under the plan or has accepted the plan [11 U.S.C. § 1141(a)]. Except as specifically provided in the plan or in the order confirming it, the confirmation has the following effects:

- Vests all property of the bankruptcy estate in the debtor [11 U.S.C. § 1141(b)];
- Frees all property dealt with by the plan of all claims and interests of creditors, equity security

holders, and general partners of the debtor [11 U.S.C. § 1141(c)]; and

- Discharges the debtor from any debt that arose before the date of confirmation, as well as any debt arising because of the plan's rejection of any executory contract or unexpired lease [11 U.S.C. § 1141(d)(1); *but see* 11 U.S.C. § 1141(d)(2), (3), (5), (6) (exceptions)].

The debtor is not discharged when [11 U.S.C. § 1141(d)(3)]:

- The plan provides for liquidation of all or substantially all of the property of the bankruptcy estate;
- The debtor does not engage in business after consummation of the plan; and
- The debtor would be denied a discharge under 11 U.S.C. § 727(a) in a Chapter 7 case.

If the debtor is an individual, a discharge under Chapter 11 does not discharge the debtor from any debt excepted from discharge under 11 U.S.C. § 523, which generally lists types of debts that are nondischargeable in bankruptcy proceedings [11 U.S.C. § 1141(d)(2)]. Furthermore, if the debtor is an individual, unless after notice and a hearing the court orders otherwise for cause, confirmation of the plan does not discharge any debt provided for in the plan until the court grants a discharge on completion of all payments under the plan [11 U.S.C. § 1141(d)(5)(A)]. However, at any time after the confirmation of the plan, and after notice and a hearing, the court may grant a discharge to the debtor who has not completed payments under the plan if the value, as of the effective date of the plan, of property actually distributed under the plan on account of each allowed unsecured claim is not less than the amount that would have been paid on that claim if the estate of the debtor had been liquidated under Chapter 7 on that date, provided modification of the plan under 11 U.S.C. § 1127 (providing generally for plan modifications) is not practicable [11 U.S.C. § 1141(d)(5)(B)].

The confirmation of a plan does not discharge a debtor that is a corporation from any debt of a kind specified in 11 U.S.C. § 523(a)(2)(A) or (2)(B) (fraud) that is owed to a domestic governmental unit or owed to a person as the result of an action filed under 31 U.S.C. § 3721 *et seq.* (claims against the federal government) or any similar state statute [11 U.S.C. § 1141(d)(6)(A)]. Confirmation also does not discharge the corporation from any debt for a tax or customs duty with respect to which the corporation either made a fraudulent return or willfully attempted in any manner to evade or to defeat that tax or customs duty [11 U.S.C. § 1141(d)(6)(B)].

[h] Appointment of Trustee or Examiner

The court in a Chapter 11 case may appoint a bankruptcy trustee at any time after commencement of the case, but before confirmation of a plan for the debtor, if a party in interest or the United States trustee for the judicial district in which the case is pending requests the appointment, and the protection afforded by a trustee is needed [11 U.S.C. § 1104(a)]. The protection of a trustee is required in cases involving fraud, dishonesty, incompetence, or gross mismanagement of the affairs of the debtor by its management, or when the appointment of a trustee is in the best interest of creditors, any equity security holders, or other interests of the estate [11 U.S.C. § 1104(a)(1)].

The trustee must perform the following duties, among others [*see* 11 U.S.C. §§ 704, 1106(a)(1),(2),(6)]:

- Account for all property received.
- When a purpose would be served, examine proofs of claims and object to the allowance of any claim that is improper.
- Furnish any information concerning the estate and the estate's administration that a party in interest

requests.

- While the debtor continues to operate the business, file with the appropriate parties periodic reports and summaries of the operation of the business.
- File a list of creditors and a schedule of certain financial information [*see 11 U.S.C. § 521(a)(1)*].
- Supply any information requested by tax authorities.
- File a final report and account of the administration of the debtor's estate.

In addition, as soon as practicable, the trustee must file with the court either a reorganization plan, a report about why such a plan will not be filed, or a recommendation that the reorganization case be dismissed or be converted into another type of bankruptcy [*11 U.S.C. § 1106(a)(5)*].

Except to the extent that the court orders otherwise, the trustee has a special duty to investigate the acts, conduct, assets, liabilities, and financial condition of the debtor, the operations of the debtor's business, the desirability of the continuance of the debtor's business, and any other matter relevant to the case or to the formulation of a reorganization plan for the debtor [*11 U.S.C. § 1106(a)(3)*]. The trustee must file a statement of any such investigation and transmit a copy or summary of the statement to any creditors' committees or equity security holders' committees appointed by the court [*see [c], above*] and to any other entities designated by the court [*11 U.S.C. § 1106(a)(4)*].

If there is a claim for a domestic support obligation with respect to the debtor, the trustee must provide specified notices to the claim holder and the state child support enforcement agency [*11 U.S.C. § 1106(a)(8), (c)*].

If the court has not appointed a trustee, it may, after notice and hearing on request of a party in interest or the United States trustee for the judicial district in which the case is pending, appoint an examiner, provided the appointment is made in the interests of the creditors or the debtor's unsecured debts exceed \$5 million. The examiner is responsible to the bankruptcy court for any appropriate investigation of the debtor, including an investigation of allegations of fraud, dishonesty, incompetence, or irregularity of management of the debtor [*11 U.S.C. § 1104(c)*].

[i] Recovery of Property

Preferential or fraudulent transfers of property by a debtor prior to a bankruptcy proceeding may be recovered for the bankruptcy estate [*see 11 U.S.C. §§ 547, 548*]. For determinations relative to whether certain transfers are reversible, see § 78.111.

A bankruptcy court may order that property seized by the Internal Revenue Service to satisfy a tax lien be returned to a trustee or debtor in possession for the purposes of a Chapter 11 reorganization. An entity in possession of a debtor's property must return it to the trustee for inclusion in the bankruptcy estate [*see United States v. Whiting Pools, Inc. (1983) 462 U.S. 198, 201 ; see also 11 U.S.C. § 542(a)*].

A bankruptcy court may not impose a constructive trust in favor of the payors with respect to funds they paid to an insolvent company one week before it filed for bankruptcy, unless fraud is involved [*In re North American Coin & Currency, Ltd. (9th Cir. 1985) 767 F.2d 1573, 1575-1576*].

[j] Acceptance of Leases

A Chapter 11 debtor who is a lessee owes the lessor nothing under the lease until the debtor either assumes the lease (in which case the debtor is liable under the lease) or rejects it (in which case the debtor would be liable for breach of

contract). Assumption or rejection is central to a plan of reorganization for such a debtor. Subject to a 60-day limitation, which can be extended on motion, a nonresidential lease must be assumed within 60 days, otherwise it is deemed abandoned [11 U.S.C. § 365(d)(4)]. The debtor has a reasonable time to assume or reject the lease. What constitutes a reasonable time is left to the bankruptcy court's discretion in light of the circumstances of each case [*Theatre Holding Corp. v. Mauro* (2d Cir. 1982) 681 F.2d 102, 105-106].

[k] Assumption of Collective Bargaining Agreements

A collective bargaining agreement remains in effect after the filing of a petition in bankruptcy [11 U.S.C. § 1113]. Before seeking rejection of any collective bargaining agreement, the trustee is required to contact the collective bargaining representative, offer a proposal for modification of employees benefits that meets statutory standards of reasonableness, and confer in good faith to reach a mutually satisfactory agreement [11 U.S.C. § 1113(b)]. If those efforts are unsuccessful, the trustee may file an application for rejection of the agreement [11 U.S.C. § 1113(c)], after which the court will hold a hearing on the application [11 U.S.C. § 1113(d)(1)] and issue a ruling [11 U.S.C. § 1113(d)(2)]. A trustee may not make unilateral changes in the terms or conditions of a collective bargaining agreement unless the court fails to rule on an application for rejection within the required time frame [*United Food & Commer. Workers Union, Local 328 v. Almac's Inc.* (1st Cir. 1996) 90 F.3d 1, 4 ; see 11 U.S.C. § 1113(d)(2), (f); see also *Carpenters Health & Welfare Trust Funds v. Robertson* (In re *Rufener Constr.*) (9th Cir. 1995) 53 F.3d 1064, 1066].

[5] Liquidation (Chapter 7)

[a] In General

A business debtor whose financial condition cannot benefit from a Chapter 11 reorganization [see [4], above] may have no choice but to proceed with a liquidation under Chapter 7 of the Bankruptcy Code [see 11 U.S.C. § 701 et seq.]. Liquidation, often called a "straight bankruptcy," is a drastic remedy, since it puts an end to the debtor's current business life. When all other remedies have been found to be inadequate, however, it may be the only way to relieve the debtor of overwhelming obligations.

Generally, a liquidation serves two purposes. It converts the assets of the debtor into cash for distribution among creditors; and it provides the debtor with relief from oppressive indebtedness, permitting the debtor to start fresh, free from the obligations and responsibilities resulting from business misfortunes [*Williams v. United States Fidelity & Guaranty Co.* (1914) 236 U.S. 549, 554]. Incidental to these purposes is the power of the trustee in bankruptcy to resolve disputes with creditors by compromise settlements on terms favorable to the estate in bankruptcy [11 U.S.C. § 50; *In re Transcontinental Energy Corp.* (9th Cir. 1985) 764 F.2d 1296, 1298].

[b] Governing Law

Chapter 7 sets forth the basic procedures for conducting a liquidation case. However, counsel must also consult Chapter 3 [11 U.S.C. § 301 et seq.] and Chapter 5 [11 U.S.C. § 501 et seq.]. Chapter 3 sets forth the procedures for commencing a bankruptcy case and provides for the administration of a case, including meetings of creditors [see 11 U.S.C. § 341 et seq.] and the administrative powers of the bankruptcy court [see 11 U.S.C. § 361 et seq.]. Chapter 5 specifies the claims of creditors (and amounts of those claims) that will be allowed [11 U.S.C. §§ 502, 503], the priorities in which allowed claims will be paid from the bankruptcy estate [11 U.S.C. § 507], the property of the debtor that will be treated as exempt from creditors' claims [11 U.S.C. § 522], and the debts that will and will not be discharged by the liquidation [11 U.S.C. §§ 523, 524]. Chapter 5 also describes the property that belongs to the bankruptcy estate and that is therefore subject to liquidation [see 11 U.S.C. § 541].

With respect to exempt property, the Bankruptcy Code listing of property that is treated as exempt [see 11 U.S.C. § 522(d)] does not apply in California [11 U.S.C. § 522(b); CCP § 703.130]. The Code of Civil Procedure sets forth the exemptions that apply if a petition is filed under the Bankruptcy Code [see CCP § 703.140].

[c] Qualified Debtors

In order to qualify as a debtor under Chapter 7, a business debtor must be an individual, a partnership, or a corporation (except certain kinds) [11 U.S.C. § 101(41)] and must reside in the United States or have a domicile, a place of business, or property in the United States [11 U.S.C. § 109(a)]. Chapter 7 is not available to railroads and various financial corporations such as banks and insurance companies [see 11 U.S.C. § 109(b)], because liquidation of those kinds of debtors would be governed by other laws.

[d] Commencement of Case

A Chapter 7 case may be commenced on either a voluntary or an involuntary basis. A voluntary case is initiated by the debtor [11 U.S.C. § 301(a)] or by an individual debtor and spouse [11 U.S.C. § 302(a)].

An involuntary liquidation case may be commenced by the filing of a petition against a debtor by interested persons as follows:

- By three or more (or one of altogether fewer than 12) creditors holding claims that are not contingent as to the liability of the debtor and are not the subject of a bona fide dispute as to liability or amount and that aggregate at least \$10,000 more than the value of liens on the debtor's property securing the claims [11 U.S.C. § 303(b)(1), (2)];
- If the debtor is a partnership, by a general partner or, under certain circumstances, by the trustee of a general partner or by the holder of a claim against the partnership [11 U.S.C. § 303(b)(3)]; or
- By a foreign representative of the estate in a foreign proceeding concerning the debtor [11 U.S.C. § 303(b)(4)].

PRACTICE TIP:

Creditors may wish to put the debtor into an involuntary Chapter 7 procedure in order to gain the benefits of an outside, independent trustee to review the assets of and liquidate the business, and in order to obtain the power of the bankruptcy court to recover assets transferred out of the business for inadequate consideration. *Commentary by John A. Vos.*

[e] Bankruptcy Estate

The commencement of a bankruptcy case creates an estate in bankruptcy that generally comprises all of the following property [11 U.S.C. § 541(a)]:

- Legal and equitable interests of the debtor in any property as of the commencement of the case [11 U.S.C. § 541(a)(1)];
- Property, which would have been property of the estate if owned by the debtor at the commencement of the case, that the debtor acquires, or becomes entitled to acquire, within 180 days after commencement of the case, whether by bequest, devise, or inheritance, or under a property settlement agreement with the debtor's spouse, or under an interlocutory or final decree of divorce, or under a life insurance policy or death benefit plan [11 U.S.C. § 541(a)(5)];
- Community property as described below [11 U.S.C. § 541(a)(2)];
- Property that the trustee in bankruptcy is authorized to recover from any third person for the benefit

of the estate [see 11 U.S.C. § 541(a)(3), (4)];

- Rents and profits from property (except rents and profits attributable to services performed by an individual debtor after commencement of the case) [11 U.S.C. § 541(a)(6)]; and
- Property that the estate acquires after the commencement of the case [11 U.S.C. § 541(a)(7)].

The bankruptcy estate will include any interest of the debtor and spouse, as of the commencement of the case, in community property that is either under the sole, equal, or joint management and control of the debtor or liable for an allowable claim against the debtor or against the debtor and spouse, but only to the extent of the liability [11 U.S.C. § 541(a)(2)]. The community property is segregated from other property in the bankruptcy estate and is to be used only to pay a fair share of bankruptcy administration costs, as determined by the court, and to pay "community claims" [see 11 U.S.C. § 726(c)]. After the included community property has been used to pay a fair share of administrative expenses, the community claims are paid first from the community property not solely liable for the debts of the debtor [11 U.S.C. § 726(c)(2)(A)], then from the community property that is solely liable for the debtor's debts [11 U.S.C. § 726(c)(2)(B)]. If all of the community property in the estate is insufficient to pay community claims, the remaining community claims will be paid from other property in the estate [see 11 U.S.C. § 726(c)(2)(C), (D)].

Property of the estate does not include the following [11 U.S.C. § 541(b)]:

- Any power that the debtor may exercise solely for the benefit of an entity other than the debtor [11 U.S.C. § 541(b)(1)].
- Any interest of the debtor as lessee under a lease of nonresidential real property that terminated at the expiration of the stated term before or during the pendency of the case [11 U.S.C. § 541(b)(2)].
- Any eligibility of the debtor to participate in programs authorized under the Higher Education Act of 1965 [see 20 U.S.C. § 1001 *et seq.*; 42 U.S.C. § 2751 *et seq.*] or any accreditation status or state licensure of the debtor at an educational institution [11 U.S.C. § 541(b)(3)].
- Any interest of the debtor in liquid or gaseous hydrocarbons to the extent that the debtor has transferred or agreed to transfer the interest pursuant to a farmout agreement [see 11 U.S.C. § 101(21A) (definition)] or any written agreement that is directly related to a farmout agreement, if but for the operation of this rule, the estate could include the interest only by virtue of 11 U.S.C. §§ 365 and 544(a)(3)--provided, however, that this does not exclude from the estate any consideration the debtor retains, receives, or is entitled to receive for transferring an interest in liquid or gaseous hydrocarbons pursuant to a farmout agreement [11 U.S.C. § 541(b)(4)].
- Funds placed in an education individual retirement account (a Coverdell education savings account) [see I.R.C. § 530(b)(1) (applicable definition)] not later than 365 days before the date of the filing of the petition, subject to specified limitations [11 U.S.C. § 541(b)(5), (e)].
- Funds used to purchase a tuition credit or certificate or contributed to an account in accordance with I.R.C. § 529(b)(1)(A) under a qualified state tuition program not later than 365 days before the date of the filing of the petition, subject to specified limitations [11 U.S.C. § 541(b)(6), (e)].
- Certain amounts withheld by an employer from the wages of employees for payment as contributions to an employee benefit plan, a governmental plan, a deferred compensation plan, a tax-deferred annuity, or a health insurance plan, and certain amounts received by an employer from employees for payment as contributions to any such plan [11 U.S.C. § 541(b)(7)].

- Certain interests of the debtor in property, when the debtor pledged or sold tangible personal property (other than securities or written or printed evidences of indebtedness or title) as collateral for a loan or advance of money given by a person licensed under law to make such loans or advances, the tangible personal property is in the possession of the pledgee or transferee, the debtor has no obligation to repay the money, redeem the collateral, or buy back the property at a stipulated price, and neither the debtor nor the trustee have exercised any right to redeem provided under the contract or state law, in a timely manner [11 U.S.C. § 541(b)(8)].

- Any interest in cash or cash equivalents that constitute proceeds of a sale by the debtor of a money order that is made on or after the date that is 14 days before the date the petition is filed and under an agreement with a money order issuer that prohibits the commingling of such proceeds with property of the debtor (notwithstanding that, contrary to the agreement, the proceeds may have been commingled with property of the debtor), unless the money order issuer had not taken action, before the filing of the petition, to require compliance with the prohibition [11 U.S.C. § 541(b)(9)].

However, there is no exclusion from the estate for any consideration the debtor retains, receives, or is entitled to receive for a transfer under a farmout agreement [11 U.S.C. § 541(b)].

[f] Dischargeable Debts

A discharge in bankruptcy voids any judgment obtained at any time to the extent the judgment is a determination of the personal liability of the debtor for any debt discharged in bankruptcy [11 U.S.C. § 524(a)(1)]. Further, the discharge in bankruptcy prevents attempts to collect a dischargeable debt, since it bars the commencement or continuation of an action, the employment of process, or "any act" (such as telephone calls, letters, and personal contacts) to collect, recover, or offset any dischargeable debt as a personal liability of the debtor [11 U.S.C. § 524(a)(2); H.R. Rep. 95-595, 95th Cong., 1st sess., 366 (1977)].

The Bankruptcy Code lists several types of debts that will not be discharged in a bankruptcy case, including most taxes, governmental fines, and certain claims for willful or malicious injury [see 11 U.S.C. § 523(a)]. Among other things, bankruptcy does not discharge a debtor from debts for alimony, support, and maintenance for a spouse or child [see 11 U.S.C. § 523(a)(5)] or from a debt arising out of a marital settlement agreement [11 U.S.C. § 523(a)(15)].

[g] Distribution of Estate and Discharge of Debtor

After reducing the property of the estate to money, the trustee must distribute the money in the manner specified by statute [see 11 U.S.C. § 726] and file a final report and account of the administration of the estate with the court and the United States trustee for the judicial district in which the case is pending [11 U.S.C. § 704(a)(9)]. The court must then either grant or deny the debtor the discharge in bankruptcy [see 11 U.S.C. § 727].

Once the property of the estate has been reduced to money, it will be distributed in payment of claims in the following order [11 U.S.C. § 726(a)]:

- First, all claims having priority [see 11 U.S.C. § 507; see also § 78.131].
- Second, all allowed unsecured claims that were timely filed and those that tardily filed by a creditor who did not have notice or actual knowledge of the case in time to file a timely claim, proof of which is filed in time to permit payment.
- Third, all allowed unsecured claims that were otherwise tardily filed.

- Fourth, every allowed claim, whether secured or unsecured, for any fine, penalty, or forfeiture, or for multiple, exemplary, or punitive damages arising before entry of the order of relief or the appointment of a trustee, whichever was earlier, to the extent that the amount is not compensation for actual pecuniary loss suffered by the holder of the claim.

- Fifth, interest on the claims paid, to be computed at the legal rate from the date of commencement of the case.

After those claims have been paid, any property remaining in the estate belongs to the debtor [11 U.S.C. § 726(a)(6)].

Generally, the bankruptcy court must grant a discharge to the debtor unless the debtor either is not an individual, or has been discharged in a prior case commenced within six years (under Chapter 12 or Chapter 13) or eight years (under Chapter 7 or Chapter 11) prior to the date the petition in the present case was filed, or has committed some type of wrongdoing in the present case that is prohibited by the Bankruptcy Code [see 11 U.S.C. § 727(a)]. The prohibition against granting a discharge to a debtor other than an individual is intended to avoid trafficking in corporate shells. A corporation whose assets have been liquidated to pay creditors in bankruptcy is simply a shell incapable of doing business and should be dissolved rather than granted a discharge in bankruptcy [see H.R. Rep. 95-595, 95th Cong., 1st sess., 125, 384 (1977)].

PRACTICE TIP:

Typically such a shell is simply abandoned, as the costs of formal dissolution are disproportionate to the benefits of further relief. *Commentary by John A. Vos.*

Legal Topics:

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CHAPTER 78 CREDITORS' AGREEMENTS: NONBANKRUPTCY ALTERNATIVES
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AUTHOR: John A. Vos, Practice Consultant

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CHAPTER 78 CREDITORS' AGREEMENTS: NONBANKRUPTCY ALTERNATIVES
PART III. TRANSACTION GUIDE
A. Client Interview--Facts and Documents

27-78 California Legal Forms--Transaction Guide § 78.100

AUTHOR: John A. Vos, Practice Consultant

§ 78.100 Facts

1. Name, address, and telephone number of debtor.
2. Legal status of debtor.
 - a. Sole proprietorship.
 - b. Partnership.
 - c. Limited partnership.
 - d. Corporation.
 - e. Limited liability company.
3. Formation, operation, and management.
 - a. State of formation or incorporation.
 - b. Date of formation or incorporation.
 - c. Names, addresses, and titles of principal officers, general partners, or other key individuals.

- d. For a corporation, number, names, and addresses of board members.
- e. Other states, if any, in which qualified to do business.
- 4. Name and location of any branches, subsidiaries, or affiliated firms of debtor.
- 5. How long debtor has been in business.
- 6. Major business activity of debtor and other general characteristics of business, as appropriate.
 - a. Products.
 - b. Markets.
 - c. Distribution channels.
 - d. Management structure.
 - e. Personnel.
 - f. Property, plant, and equipment.
 - g. Copyrights, patents, trademarks, trade secrets, licenses, and expertise.
- 7. Credit rating.
- 8. For each creditor:
 - a. Name and address.
 - b. Amount owed.
 - c. Status of debt:
 - (1) Secured.
 - (a) Type of security.
 - (b) Liquidation value of security.
 - (2) Unsecured.
 - (a) With priority claim.
 - (b) Without priority claim.
- d. Present relationship with creditor, such as:
 - (1) Invoices no longer being discounted.
 - (2) Credit payments lagging.

(3) Future credit no longer being extended.

(4) Lawsuits filed.

(5) Tax liens filed.

9. Co-obligors on any liability, and personal guarantees of any corporate debt.

10. Present financial condition.

a. Balance sheet values for:

(1) Total assets.

(2) Total liabilities.

b. Lack of liquidity (fair value of assets in place exceeding liabilities).

c. Liabilities exceeding fair value of assets in place.

d. Underlying cause of present condition [*see* § 78.110].

e. How long present condition has existed.

11. Debtor's desired remedial course of action.

a. Rehabilitation of credit situation and continuance in business.

b. Liquidation of business in whole or in part.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts Law
Debtor & Creditor Relations



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DIVISION V: CONTRACTS AND OBLIGATIONS
CHAPTER 78 CREDITORS' AGREEMENTS: NONBANKRUPTCY ALTERNATIVES
PART III. TRANSACTION GUIDE
A. Client Interview--Facts and Documents

27-78 California Legal Forms--Transaction Guide § 78.101

AUTHOR: John A. Vos, Practice Consultant

§ 78.101 Documents

1. Organizational documents.

- a. For corporation, copies of articles of incorporation and bylaws.
- b. For partnership, copy of partnership agreement.
- c. For limited liability company, copies of articles of organization and operating agreement.

3. Financial statements for current year and preceding three years.

- a. Balance sheet.
- b. Income statement.
- c. Statement of retained earnings, if any.
- d. Schedule of liabilities with:
 - (1) Name and address of each creditor.
 - (2) Amount owed to each.
 - (3) Whether debt is unsecured, unsecured with priority claim, or secured (and how

secured, if appropriate).

NOTE:

The financial statements should be prepared by an independent public accountant. They should be in the form of an audit report containing a balance sheet, income statement, retained earnings or surplus reconciliation, if any, and supporting schedules. Creditors may require that the financial statements be projected into future years.

4. Tax returns for five years.
5. Bank statement for two years.
6. Security instruments relating to secured indebtedness.
7. Growth plan for future of business, if Chapter 11 reorganization is possibility.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts Law
Debtor & Creditor Relations



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27-78 California Legal Forms--Transaction Guide §§ 78.102-78.109

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[Reserved]

§§ 78.102[Reserved]



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DIVISION V: CONTRACTS AND OBLIGATIONS
CHAPTER 78 CREDITORS' AGREEMENTS: NONBANKRUPTCY ALTERNATIVES
PART III. TRANSACTION GUIDE
B. Preliminary Determinations

27-78 California Legal Forms--Transaction Guide § 78.110

AUTHOR: John A. Vos, Practice Consultant

§ 78.110 Debtor's General Financial Condition

NOTE:

A thorough financial analysis consists of a study of the relationships and trends revealed by financial statements, derived over a substantial period of time, to determine whether the financial position, results of operations, and progress of the business are satisfactory or unsatisfactory. When they are unsatisfactory, as in the case of a business experiencing financial difficulties, the study will identify the weaknesses and insufficiencies and indicate the reasons. The analysis involves measurement by standards provided by (1) past financial statements of the same enterprise, known as vertical standards, and (2) contemporary financial statements of similar enterprises, known as horizontal standards. The analysis also interprets the resulting data. For discussion of corporate financial statements (which is also applicable to general business financial statements), see Ch. 7, *Corporate Records and Reports*.

1. Ascertain general financial condition of debtor, based on review of financial statements.
 - a. Balance sheet (statement of financial position).
 - b. Statement of income (profit and loss).
 - c. Statement of retained earnings (earned surplus).
 - d. Comparative balance sheet and income statements showing:
 - (1) Absolute data in terms of dollar amounts for current and earlier periods.
 - (2) Increases and decreases in dollar amounts.

- (3) Increases and decreases in percentages.
 - e. Cash flow statement.
 - f. Cash budget.
 - g. Business trend analysis.
2. Ascertain amount of debtor's total liabilities [*see 11 U.S.C. § 521(a)(1)*].
- a. Current liabilities.
 - b. Fixed liabilities.
3. Classify assets [*see 11 U.S.C. § 521(a)(1)*].
- a. Liquid assets.
 - (1) Cash.
 - (2) Cash equivalent items, such as government securities.
 - b. Current assets.
 - (1) Cash.
 - (2) Marketable securities.
 - (3) Trade receivables.
 - (4) Inventories.
 - (5) Prepaid expenses.
 - c. Fixed assets.
 - d. Intellectual property.
 - e. Goodwill.
4. Identify any property of debtor covered by exemption:
- a. From execution of money judgment or in bankruptcy proceeding [*see CCP §§ 703.010, 703.130*].
- NOTE:**
State law controls on this point [*11 U.S.C. § 522(b)(1); CCP § 703.130*].
- b. From assignment for benefit of creditors [*see CCP § 1801; see also § 78.230[1][e]*].

NOTE:

This exempt property is identical to the property that is exempt from the execution of a money judgment or in a bankruptcy proceeding [**compare** CCP § 703.140(b) **with** CCP § 1801].

5. Determine debtor's relative degree of insolvency.

NOTE:

The degree of insolvency relates to the probability of nonpayment of debts in light of the debtor's circumstances and is essential to deciding the course of remedial action to pursue.

a. How does total amount of assets compare to total amount of liabilities?

NOTE:

If liabilities exceed assets, liquidation may be the necessary solution, either in a bankruptcy proceeding or by an assignment for the benefit of creditors. If assets exceed liabilities, rehabilitation may be possible, depending on the seriousness of the insolvency and the underlying cause.

b. How liquid is debtor's business?

NOTE:

The liquidity analysis is of particular significance because it measures the ability of the business to meet maturing obligations.

6. Ascertain underlying cause of debtor's distressed financial condition.

- a. Lack of managerial competence.
- b. Lack of managerial experience.
- c. Lack of experience in debtor's specific business activity.
- d. Neglect.
- e. Fraud by principals.
- f. Disaster.
- g. Other.

NOTE:

Identifying the underlying cause, as distinguished from the apparent cause or effect, is important in determining the feasibility of continuing a business. For example, if a business lacks the ability to meet its maturing obligations, apparently because of inadequate sales, competitive weakness, receivables difficulties, inventory difficulties, heavy operating expenses, excessive fixed assets, poor location, or a similar condition, any one of these may be only the apparent cause. The underlying cause may in fact be one or more of the conditions listed under P 6, **above**. This being the case, likelihood of a successful rehabilitation is unlikely unless there is an accompanying restructuring of the

management. If fraud on the part of the principals is the underlying cause, it is futile generally to attempt a solution other than liquidation regardless of the degree of insolvency; the creditors would not be interested in any other course.

7. Determine debtor's competitive position in market.
8. Determine amount of financing debtor needs to continue operations.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawDebtor & Creditor Relations



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27-78 California Legal Forms--Transaction Guide § 78.111

AUTHOR: John A. Vos, Practice Consultant

§ 78.111 Feasibility of Nonbankruptcy Rehabilitation

1. Determine whether bankruptcy proceeding is necessary because debtor wishes to take any of following steps requiring special enforcement powers under Chapter 11 of Bankruptcy Code [*see 11 U.S.C. § 1101 et seq.*; *see also* Collier Bankruptcy Practice Guide, Ch. 3, *Non-Bankruptcy Alternatives* (Matthew Bender)].

a. Seek either [*see 11 U.S.C. § 362(a)*]:

(1) Stay of action or proceeding against debtor; or

(2) Lien enforcement.

b. Obtain credit secured by lien senior or equal to existing lien [*see 11 U.S.C. § 364(d)*].

c. Reject executory contracts, such as collective bargaining agreements or unexpired leases [*see 11 U.S.C. §§ 365(a), 1113*].

d. Avoid effect of contractual insolvency clauses [*see 11 U.S.C. § 365(e)*].

e. Limit lessor's claim for damages resulting from termination of lease of real property [*see 11 U.S.C. § 502(b)(6)*].

f. Limit claim of employee for damages resulting from termination of employment contract [*see 11 U.S.C. § 502(b)(7)*].

g. Defer payment of unsecured tax claims [*see 11 U.S.C. § 1129(a)(9)(C)*].

h. Require persons with possession, custody, or control of debtor's property to turn over that property [*see 11 U.S.C. §§ 542, 543; see also § 78.15[4][h]*].

NOTE:

Subject to any applicable privilege, after notice and a hearing, the court may order an attorney, accountant, or other person holding recorded information (including books, documents, records, and papers), relating to the debtor's property or financial affairs, to turn over or disclose the recorded information [*11 U.S.C. § 542(e)*]. This does not limit the trustee's ability to obtain a debtor corporation's information within the scope of the corporation's attorney-client privilege; nor was it intended, as the legislative history makes clear, to be used to create an attorney-client privilege assertable on behalf of the debtor against the trustee [*Commodity Futures Trading Commission v. Weintraub* (1985) 12 C.B.C.2d 651] .

2. With respect to each creditor of debtor, ascertain [*see 11 U.S.C. § 521(a)(1); see also Fed. R. Bankr. P., Rule 1007(a)(1), (2)*]:

a. Full business name.

b. Business address.

c. Total amount owed.

d. Type of liability.

(1) Priority [*see § 78.12[1][b]*].

(2) Secured.

(3) General unsecured.

(4) Subordinated.

(5) Contingent.

(6) Unliquidated.

(7) Disputed.

3. Identify persons or entities (other than debtor) having equity position in debtor's business entity and value of each position [*see Fed. R. Bankr. P., Rule 1007(a)(3)*].

4. Determine whether debtor made preferential transfer of interest in property, which may be avoided under Bankruptcy Code [*see 11 U.S.C. § 547*].

a. Transfer to or for benefit of creditor.

b. Transfer for or on account of antecedent debt owed by debtor before transfer was made.

c. Transfer while debtor was insolvent.

d. Transfer on, or within 90 days immediately preceding, date of filing bankruptcy petition [*see 11 U.S.C. § 547(f)* (presumption of insolvency during that period)].

e. Transfer within one year before date of filing of petition, if made to creditor who at time of transfer was insider [*see 11 U.S.C. § 101(31)* (definition)].

f. Transfer enabling creditor to receive more than creditor would have received if:

(1) Bankruptcy case were under Chapter 7 of Bankruptcy Code [*11 U.S.C. § 701 et seq.*];

(2) Transfer had not been made; and

(3) Creditor had received payment of debt to extent provided by Bankruptcy Code.

NOTE:

If the debtor has preferentially transferred any property [*see 11 U.S.C. § 547(b)*] to an "insider" [*see 11 U.S.C. § 101(31)*], the preferential transfer, under certain circumstances, may be set aside [*see 11 U.S.C. § 547; see also* Collier On Bankruptcy, Ch. 547, **Preferences** (Matthew Bender)]. Certain types of transfers are excepted from avoidance [*see 11 U.S.C. § 547(c); see also* Collier On Bankruptcy, Ch. 547, **Preferences**, Pt. IV (Matthew Bender)]. Creditors generally will not agree to an out-of-court rehabilitation plan when a preferential transfer has been made that materially reduces the amount of the debtor's property available for distribution to creditors, if it can be avoided only through a bankruptcy proceeding. For the types of transfers that may be reversed by an assignee under a general assignment for the benefit of creditors, see *Code Civ. Proc. § 1800* and discussion in § 78.230[1][d].

5. Determine whether debtor made transfer of property that may be set aside, under Bankruptcy Code or under state law, as fraudulent [*see 11 U.S.C. § 548; see also Civ. Code § 3439.04; e.g., Sanwa Bank California v. Chang (2001) 87 Cal. App. 4th 1314, 1317-1318, 105 Cal. Rptr. 2d 330* (creditor brought action against debtor's wife who received fraudulent conveyance from husband)].

a. Ascertain whether debtor had actual intent to hinder, delay, or defraud any creditor of debtor.

b. Ascertain whether debtor failed to receive reasonably equivalent value in exchange for property [*e.g., Batlan v. Bledsoe (In re Bledsoe) (9th Cir. 2009) 569 F.3d 1106, 2009 U.S. App. LEXIS 13677, at *1* (dissolution judgment in regularly conducted and contested divorce proceeding conclusively establishes reasonably equivalent value under *11 U.S.C. § 548(a)(1)(B)*), in absence of fraud, collusion, or violation of state law)], and either:

(1) Was insolvent at time of, or became insolvent as result of, transfer.

(2) Was engaged or about to become engaged in business or transaction for which remaining assets were unreasonably small in relation to business or transaction.

(3) Intended or expected to incur debts beyond ability to pay them as they became due.

(4) Made transfer to or for benefit of insider, or incurred obligation to or for benefit of insider, under employment contract and not in ordinary course of business [11 U.S.C. § 548(a)(1)(B)(ii)(IV)].

NOTE:

The federal statute on fraudulent conveyances applies to transfers made within two years before a bankruptcy petition is filed [see 11 U.S.C. § 548(a)(1)]. There is no similar time limitation under the California statute, except the statute of limitations [see Civ. Code §§ 3439.04, 3439.05, 3439.09; see also *Macedo v. Bosio* (2001) 86 Cal. App. 4th 1044, 1051-1052, 104 Cal. Rptr. 2d 1 (statute of limitations is Code Civ. Proc. § 338(d) when common law action is brought; cause of action accrues when judgment against debtor is secured rather than when fraudulent transfer occurs); *Cortez v. Vogt* (1997) 52 Cal. App. 4th 917, 937, 60 Cal. Rptr. 2d 841 (construing statute of limitations when alleged fraudulent transfer was made during pending lawsuit)].

6. Determine debtor's potential to benefit from rehabilitative measures.

- a. Financial condition suitable for rehabilitation [see § 78.110].
- b. Responsible business reputation.
- c. Ability to rehabilitate business after debt adjustment.
- d. Good financial position for recovery after debt adjustment.
- e. Favorable general business and competitive conditions.

NOTE:

Many insolvencies result from poor management. In an out-of-court adjustment, it is usually contemplated that the creditors will continue selling to the debtor. Unless the debtor has, or can provide, the competence to rehabilitate and properly manage the business, the creditors would be making futile sacrifices.

Either the terms of the adjustment must establish the debtor in a good working capital position, or the debtor must have reasonable prospects of raising new equity capital or borrowing for this purpose.

The general business climate must be at least favorable enough so that the debtor, aided by an adjustment, can recover. Creditors will not be interested in supporting the rehabilitation of a debtor under unfavorable general business or local competitive conditions.

7. Ascertain which creditors are secured and which are unsecured with priority claims [see § 78.12[1]].

NOTE:

A voluntary settlement is difficult to arrange when there are secured or priority claims against the debtor. Unless given absolute assurance that each such claim has been disposed of adequately, creditors will not generally accept a voluntary settlement.

8. Determine whether creditors all would have to agree to out-of-court rehabilitation plan, or alternatively, debtor or

majority of creditors might pay claims of minority dissenting creditors.

NOTE:

Any dissenting creditor could impair, if not defeat, a proposed rehabilitation program by attaching the debtor's property or, under certain circumstances, initiating bankruptcy proceedings. Consequently, all creditors, or at least all major creditors, should become parties to any agreement. Dissenting creditors who have relatively small claims or who are willing to reduce their claims to a small amount, might be paid in full out of liquid assets when available or by the major creditors if liquid assets are not available. Otherwise, a Chapter 11 reorganization will be necessary to bind dissenting members of a class of creditors [*see 11 U.S.C. § 1126(c)*] or to bind a dissenting class of creditors [*see 11 U.S.C. § 1129(b)*]

9. Ascertain whether creditors will continue to supply debtor on regular basis.

NOTE:

The supply of crucial materials and services is essential to a successful rehabilitation of the debtor's business.

10. Ascertain whether debtor will have capital to pay day-to-day operating expenses for business.

11. Estimate administration costs of Chapter 11 reorganization [*11 U.S.C. § 1101 et seq.*].

NOTE:

A proposed out-of-court rehabilitation program may be effectively blocked by creditor opposition, forcing the debtor to petition for a Chapter 11 reorganization. The costs of such a proceeding may be substantial and reduce the amount available to general creditors. This is a factor that may have persuasive value with creditors otherwise reluctant to agree to an out-of-court arrangement. For discussion of allowable administrative expenses, see Collier On Bankruptcy, Ch. 503, ***Allowance of Administrative Expenses*** (Matthew Bender).

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts Law
Debtor & Creditor Relations



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27-78 California Legal Forms--Transaction Guide §§ 78.112-78.119

AUTHOR: John A. Vos, Practice Consultant

[Reserved]

§§ 78.112[Reserved]



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27-78 California Legal Forms--Transaction Guide § 78.120

AUTHOR: John A. Vos, Practice Consultant

§ 78.120 Alternative Procedures

1. If analysis of factors in § 78.111, *above*, indicates that out-of-court rehabilitation is feasible, negotiate [see § 78.121] and draft [see § 78.130 et seq.] appropriate agreements:

- a. Extension agreement [see § 78.12[2][a]].
- b. Composition agreement [see § 78.12[2][b]].
- c. Combination agreement [see § 78.12[2][c]].

2. If analysis of factors in § 78.111, *above*, indicates that out-of-court rehabilitation is not feasible, take alternative remedial measures:

- c. Liquidation through assignment for benefit of creditors [see §§ 78.13, 78.123].
 - a. Chapter 11 reorganization [see § 78.15[4]].
 - b. Chapter 7 liquidation [see § 78.15[5]].

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27-78 California Legal Forms--Transaction Guide § 78.121

AUTHOR: John A. Vos, Practice Consultant

§ 78.121 Creditors' Meeting

NOTE:

Unless the number of creditors is very small, a committee of creditors generally is used. The committee typically consists of representatives of the major unsecured creditors. The committee will have its own counsel and, often, professional financial advisers. Members of a committee organized before the commencement of a bankruptcy reorganization may serve as the creditors' committee in an ensuing bankruptcy proceeding if the committee was fairly chosen and is representative of the different kinds of claims to be represented [11 U.S.C. § 1102(b)(1)]. A court may conclude that a committee meets those criteria if the court determines that the selection process complied with the steps set forth in *Fed. R. Bankr. P., Rule 2007*. For discussion of the selection process, see *Collier On Bankruptcy*, Ch. 2007, ***Review of Appointment of Creditors' Committee Organized Before Commencement of the Case*** (Matthew Bender).

The efficiency of obtaining agreement from a small group familiar with the debtor's affairs rather than soliciting the creditors generally should be weighed against the potential liability of the committee and its members in exercising representative powers and the cost and inconvenience of complying with the Trust Indenture Act [15 U.S.C. § 77aaa et seq.] and other statutes [see *Collier Bankruptcy Practice Guide*, Ch. 3, ***Non-Bankruptcy Alternatives*** (Matthew Bender)].

1. Arrange meeting of all creditors if possible, but especially those holding largest percentage of unsecured debt.
2. Alternatively, consider feasibility of using creditors' committee to negotiate acceptable rehabilitation plan and supervise and advise debtor during adjustment period.

a. Monitor selection and appointment procedure to verify that committee is fairly chosen and representative of different kinds of claims to be represented [*cf. Fed. R. Bankr. P., Rule 2007*].

(1) Have committee selected at meeting by majority in number and amount of claims of unsecured creditors who [*see 11 U.S.C. § 702(a)*]:

(a) Hold allowable, undisputed, fixed, liquidated, unsecured claim;

(b) Do not have interest materially adverse to interest of other creditors; and

(c) Are not insiders [*see 11 U.S.C. § 101(31)* (definition)].

(2) Give at least five days' written notice of meeting to:

(a) All unsecured creditors with unsecured claims of over \$1,000; or

(b) Up to 100 unsecured creditors having largest claims.

(3) Record written minutes of meeting, reporting names of creditors present or represented and voting.

(4) Keep record of amounts of creditors' claims.

(5) Solicit any proxies in accordance with *Fed. R. Bankr. P., Rule 2006* [*see Collier On Bankruptcy, Ch. 2006, Solicitation and Voting of Proxies in Chapter 7 Liquidation Cases* (Matthew Bender)].

(6) Ensure that organization of meeting is otherwise fair and proper.

b. Consult with debtor and creditors about whether licensed credit agency should be member of committee.

Legal Topics:

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

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27-78 California Legal Forms--Transaction Guide § 78.122

AUTHOR: John A. Vos, Practice Consultant

§ 78.122 Soliciting Acceptance of Creditors

1. Either before or immediately after initial creditors' meeting, assist debtor and financial professionals in preparing general statement of debtor's case containing at least:

NOTE:

The statement should be based on historical and financial data and should present an overall picture of the debtor and the line of business, including character and ability of management, financial condition, underlying cause of the distressed condition, and a proposal for rehabilitation. Of particular importance to the creditors are good moral character of the debtor and managerial competence. If poor management is the underlying cause of the debtor's distressed condition, the creditors will want to be satisfied that this has been corrected for the future before extending the help sought.

a. Historical data.

(1) Business name, address, and telephone number.

(2) Name, address, and telephone number of counsel.

(3) Name, address, and telephone number of accountant.

(4) Form of business organization, together with augmenting information regarding nature and extent of ownership, as appropriate to form of organization.

(5) Age of business.

b. Financial data.

- (1) Size of payroll.
- (2) Total assets.
- (3) Total liabilities.
- (4) Current assets.
- (5) Current liabilities.
- (6) Working capital (current assets less current liabilities).
- (7) Financial condition [*see* § 78.110].
- (8) How long distressed condition has existed.
- (9) Name and address of each secured creditor, basis of claim, nature of security, and amount owed.
- (10) Name and address of each unsecured creditor with priority claim, basis of claim, and amount owed.
- (11) Name and address of every other creditor, basis of claim, and amount owed.

c. Evaluation of business.

NOTE:

An evaluation of the business should cover products, markets, distributive channels, management structure, personnel, property, plant and equipment, as appropriate for the particular business. The evaluation, which is in the nature of an overall inventory, should reveal the strengths and weaknesses of the business and desired growth direction. It is separate from a financial analysis based on financial statements.

d. Underlying cause of debtor's distressed financial condition.

NOTE:

Except in the case of a cause beyond the control of the debtor (such as a flood, riot, or other disaster), distressed debtors tend to blame their plight on inadequate working capital. Ordinarily this is a condition, rather than a cause, resulting from poor management. It is important that the true underlying cause be recognized and stated to a creditors' committee, which is likely to have expertise in management and finance.

e. Corrective action to be taken.

f. Present and projected financial requirements.

NOTE:

In addition to providing for liquidity, these requirements may include replacement costs for equipment, research and development on products, and similar needs.

g. Existing and anticipated sources and amounts of financing.

(1) Equity contributions of owners.

(2) New equity capital obtainable.

(3) Debt capital (current and long term).

(4) New debt capital obtainable by borrowing in money market.

(5) Debt capital obtainable from existing creditors through extension, composition, or combination settlement agreement with them.

h. Value of assets at forced bankruptcy sale.

NOTE:

It is important to know approximately what amount the assets would bring at a forced sale. Creditors would expect to obtain at least that much in a voluntary settlement.

2. Draft proposed rehabilitation agreement [*see* § 78.130 et seq.].

3. Determine who will present debtor's proposal for rehabilitation to creditors.

NOTE:

There may be a more favorable reception from creditors if some of the creditors or a creditors' committee were to present the proposal. If that is not possible, the debtor, debtor's counsel, or some other representative can make the presentation.

4. Submit relevant documents to creditors for review.

a. Financial statements.

b. Debtor's general statement to creditors [*see* § 78.122].

c. Proposed rehabilitation agreement.

NOTE:

The financial statements should be prepared by an independent public accountant and should include comparative past financial statements and supporting schedules, such as a balance sheet, income statement, cash flow statement, cash budget, and other data as appropriate to the circumstances of the particular case. Creditors may require financial statements to be projected into future years.

5. Solicit acceptances by creditors of rehabilitation plan.

NOTE:

In order for an out-of-court rehabilitation plan to be binding on creditors under a bankruptcy plan containing the same provisions in an ensuing Chapter 11 bankruptcy case, the solicitation of acceptances

by creditors must have complied with any applicable nonbankruptcy law, rule, or regulation governing the adequacy of disclosure in connection with the solicitation. If there is no such law, rule, or regulation, the acceptances must have been solicited after disclosure of "adequate information" [11 U.S.C. § 1126(b); *see* § 78.12[5]].

Legal Topics:

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27-78 California Legal Forms--Transaction Guide § 78.123

AUTHOR: John A. Vos, Practice Consultant

§ 78.123 Assignment for Benefit of Creditors

NOTE:

An assignment for the benefit of creditors [*see* § 78.13] may be used to liquidate an insolvent business when nonbankruptcy rehabilitation of the business would not be feasible [*see* § 78.111], provided the major creditors are willing to accept the assignment [*see* § 78.13[3]]. This section contains a checklist of the principal steps, from the creditors' point of view, that should be completed for implementing an assignment for the benefit of creditors.

1. Draft appropriate assignment for benefit of creditors, depending on form of insolvent business entity:

- a. Proprietorship [*see* § 78.230].
- b. Partnership [*see* § 78.231].

NOTE:

The form for a partnership can be used for either a general partnership or a limited partnership.

- c. Corporation [*see* § 78.232].
- d. Limited liability company [*see* § 78.233].

2. Have agreement executed by proprietor, partners or officers, and by assignee.

3. Decide whether agreement (or memorandum of agreement) will be recorded, and record it if desired, when business assets include real property [*see* § 78.230[1][j]].

4. Monitor assignee's performance to ensure that important steps are completed:

a. Check UCC financing statements in which debtor is named as either secured party or debtor.

NOTE:

By filing a financing statement, a secured creditor puts on record information as to a security interest in generally described collateral and places a duty on other creditors to inquire into that security interest [*see Borg-Warner Acceptance Corp. v. Bank of Marin* (1973) 36 Cal. App. 3d 286, 288-289, 111 Cal. Rptr. 361 (decided under prior law)]. For discussion, see Ch. 42, ***Secured Transactions*** .

b. Check list of creditors and verify information.

NOTE:

Any interested person may file a request for a debtor search report, in the Secretary of State's office, using form UCC-11. The report can help in verifying information on the list of creditors as well as in turning up financing statements that should be checked. For discussion and a copy of that form along with comments on using it, see Ch. 42, ***Secured Transactions*** .

c. Check asset list and valuations.

d. Prepare notice of assignee's sale for publication [*see* § 78.242; *see also* § 78.243].

e. Notify appropriate business tax agencies in writing and check whether tax clearance certificates are needed.

NOTE:

The assignee should ensure that any sales tax and employer tax payment and tax withholding liabilities existing because of the debtor's business will be extinguished. The State Board of Equalization, Employment Development Department, and Franchise Tax Board should be asked to issue tax clearance certificates as appropriate. Local business-tax liabilities also may be checked. For discussion of these issues in the context of a voluntary sale of a business, see Ch. 17, ***Buying and Selling a Business or Professional Practice*** .

f. Ensure that insurance is in place, and is adequate, for assets, and that assignee has been added as named insured.

g. Obtain business bank account records and confirm that bank statements will be forwarded to assignee.

h. Obtain other pertinent books and records, if any, from business.

i. Notify business landlord, if any.

j. If tax refunds will be due, check with tax agencies to ensure receipt of refunds.

Legal Topics:

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

Contracts LawDebtor & Creditor RelationsContracts LawPerformanceAssignmentGeneral Overview



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CHAPTER 78 CREDITORS' AGREEMENTS: NONBANKRUPTCY ALTERNATIVES
PART III. TRANSACTION GUIDE
C. Procedural Guide to Creditors' Agreements and Related Procedures

27-78 California Legal Forms--Transaction Guide §§ 78.124-78.129

AUTHOR: John A. Vos, Practice Consultant

[Reserved]

§§ 78.124[Reserved]



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D. Drafting Guide to Creditors' Agreements

27-78 California Legal Forms--Transaction Guide § 78.130

AUTHOR: John A. Vos, Practice Consultant

§ 78.130 Introductory Provisions

1. Include introductory paragraph or preamble [*see § 78.200[2]*] setting forth:
 - a. Date of execution of agreement.
 - b. Information concerning parties.
 - (1) Full names.
 - (2) Status and capacity.
 - (a) California corporation.
 - (b) California general or limited partnership.
 - (c) Husband and wife.
 - (d) Unmarried individual.
 - (e) Other.
2. Include recitals disclose facts giving rise to agreement and summarize purpose of agreement, including statements that:
 - a. Debtor is unable to pay debts [*see § 78.200[2]*].

b. Proposed plan will:

- (1) Allow debtor extended time to pay debts [see § 78.200[2]].
- (2) Allow debtor to pay reduced percentage of full debt [see § 78.205[2]].
- (3) Allow debtor to pay debt through combination of those two methods [see § 78.220[2]].

3. State consideration as one or more of following:

a. Agreement among creditors to:

- (1) Extend payment period [see § 78.200[2]]; or
- (2) Accept reduced sum [see §§ 78.205[2], 78.220[2]].

b. Debtor's promise to provide collateral to secure debt [see § 78.200[2]].

c. Third party's guaranty of debt [see § 78.203[2]].

d. Additional principal's promise to become liable on debt [see § 78.204[2]].

Legal Topics:

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

Contracts LawDebtor & Creditor RelationsContracts LawTypes of ContractsGeneral Overview



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27-78 California Legal Forms--Transaction Guide § 78.131

AUTHOR: John A. Vos, Practice Consultant

§ 78.131 Disposition of Debts and Claims

1. Provide for payment of general unsecured claims:
 - a. State amount of debt owed to each creditor, either in provision itself [*see § 78.200[2]*] or by reference to attached exhibit [*see § 78.201[2]*].
 - b. State amount of debt that will be paid by debtor and accepted by creditor:
 - (1) Full amount [*see § 78.201[2]*]; or
 - (2) Reduced amount, stated as percentage of full amount of debt [*see §§ 78.205[2]*, *78.220[2]*].
 - c. Set forth time and manner of paying debt, such as:
 - (1) In installments (monthly, quarterly, other) [*see § 78.200[2]*].
 - (2) On date certain (execution date of agreement or other) [*see § 78.220[2]*].
 - (3) Designated sum on date certain with balance in installments [*see § 78.220[2]*].
 - d. Indicate whether debt will accrue interest and, if so [*see § 78.200[2]*]:
 - (1) Rate of interest per annum.

(2) Date it begins to accrue.

(3) How it is payable:

(a) Amortized during payment period.

(b) Deferred until final due date for payment.

e. Group claims or interests of creditors into different classes only if each claim or interest is substantially similar to other claims or interests in its class.

NOTE:

This would be a requirement of a bankruptcy reorganization plan if bankruptcy proceedings ensued [*see 11 U.S.C. §§ 1122(a), 1123(a)(1), 1129(a)(1)*].

f. Provide formula for paying unsecured creditors:

(1) Payment to all on pro rata basis [*see § 78.201[2]*].

(2) Immediate payment to all creditors holding small claims not exceeding specified dollar amount [*see § 78.220[2]*].

NOTE:

The likelihood that a nonbankruptcy agreement will be successful improves as the number of creditors participating in the agreement increases. For dissenting creditors holding small claims, it is usually in the best interest of the debtor (and the assenting creditors) to pay the dissenting creditors in full, to prevent them from pursuing legal action against the debtor or relief under the Bankruptcy Code. Even if a bankruptcy case ensues, a bankruptcy plan may designate a separate class of claims consisting only of every unsecured claim that is less than or reduced to an amount that the court approves as reasonable and necessary for administrative convenience [*see 11 U.S.C. § 1122(b)*].

2. Provide for satisfaction, release, or modification of debtor's obligation under executory agreement, if any, to which debtor is party.

a. Unexpired lease.

b. Collective bargaining agreement.

c. Other executory contract.

NOTE:

If a debtor intends to reject any such agreement, resort to the Bankruptcy Code may be inevitable when the obligee is not amenable to an out-of-court solution [*see 11 U.S.C. §§ 365(a), 1113*].

3. State whether debts of creditors accepting agreement will be subordinated to debts incurred in ordinary course of business after effective date of agreement [*see § 78.201[2]*].

4. State whether debts will be evidenced by promissory notes to be executed by debtor, and type of security, if any [*see § 78.201[2]*].

5. In composition agreement, provide that debtor will be released and discharged from all claims of participating creditors on payment of amounts described in agreement [*see* § 78.205[2]].

Legal Topics:

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

Contracts Law
Debtor & Creditor Relations



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D. Drafting Guide to Creditors' Agreements

27-78 California Legal Forms--Transaction Guide § 78.132

AUTHOR: John A. Vos, Practice Consultant

§ 78.132 Operation of Debtor's Business During Term of Agreement

1. Identify operator or operators of debtor's business during term of agreement:
 - a. Debtor.
 - b. Agent for creditors [*see § 78.201[2]*].
 - c. Creditors' committee [*see § 78.201[2]*].
2. Include affirmative duties of debtor or other operator of business, such as duty to [*see § 78.222[2]*]:
 - a. Provide creditors (or their agent or committee) with financial statements on quarterly or other periodic basis.
 - b. Notify creditors of lawsuits or governmental actions brought against debtor.
 - c. Maintain, as appropriate for business:
 - (1) Public liability insurance.
 - (2) Fire insurance.
 - (3) Workers' compensation insurance.
 - (4) Other insurance.

- d. Pay when due:
 - (1) Federal, state, and local income taxes.
 - (2) Property taxes.
 - (3) Employment taxes.
 - e. Promptly pay and perform obligations under all leases of real or personal property.
 - f. Comply with all applicable laws, rules, regulations, and orders of any government regulatory agency.
 - g. Allow creditors or their representative reasonable access to books and records of debtor's business.
 - h. Pay creditors amounts required under agreement.
3. Prohibit operator from taking certain actions during term of agreement without prior consent of [see § 78.201[2]]:
- a. If debtor operates business: all creditors or their agent or committee.
 - b. If creditors' agent operates business: creditors' committee or all creditors.
 - c. If creditors' committee operates business: all creditors.
4. List all actions operator is prohibited from taking during term of agreement without prior consent of creditors or their representative(s), such as [see § 78.221[2]]:
- a. Assigning, selling, leasing, or otherwise transferring property, except in ordinary course of business.
 - b. Making loans.
 - c. Making expenditures in excess of maximum dollar amount for equipment or otherwise.
 - d. Encumbering or further encumbering any business assets.
 - e. Paying salary to debtor (or principals, if debtor is not individual) in excess of maximum dollar amount set forth in agreement.
5. For creditor that is supplier, state that creditor will continue to supply debtor, provided debtor pays for goods in timely fashion and is current on payments under agreement [see § 78.200[2]].

Legal Topics:

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

Business & Corporate LawCorporationsGeneral OverviewContracts LawDebtor & Creditor Relations



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27-78 California Legal Forms--Transaction Guide § 78.133

AUTHOR: John A. Vos, Practice Consultant

§ 78.133 Effectiveness and Term of Agreement

1. Set forth time when agreement is to become effective:

a. Date certain [*see* § 78.203[2]]; or

b. Date when minimum percentage of creditors have executed agreement [*see* § 78.201[2]].

2. State whether effectiveness of agreement is contingent on minimum percentage of creditors executing agreement [*see* § 78.201[2]].

NOTE:

It is always advantageous to have as many creditors as possible participate in the agreement, in order to minimize the chance that a dissenting creditor will commence involuntary bankruptcy proceedings against the debtor. Creditors may be unwilling to extend the time for payment of their claims or to compromise their claims unless a specified substantial percentage of all creditors joins in the execution of the agreement.

3. Specify term of agreement [*see* § 78.203[2]]:

a. Until a date certain.

b. Until default of agreement.

c. Until debtor has fully performed under agreement.

4. State whether any similar plan subsequently filed in bankruptcy will be binding on all creditors executing agreement [see § 78.223[2]].

Legal Topics:

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

Contracts LawContract Conditions & ProvisionsGeneral OverviewContracts LawDebtor & Creditor RelationsContracts LawPerformanceGeneral Overview



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27-78 California Legal Forms--Transaction Guide § 78.134

AUTHOR: John A. Vos, Practice Consultant

§ 78.134 Creditors' Representative

1. Identify who will represent creditors during term of agreement.
 - a. Creditors as a group.
 - b. Agent.
 - c. Creditors' committee.
2. Specifically designate agent, if any, and describe method of appointment of any successor agent.
3. Provide for creditors' committee to be representative, and include provisions for [see § 78.202[2]]:
 - a. Selection of initial members.
 - b. Selection of successors.
 - c. Resignation of members.
 - d. Procedure for selecting chairperson.
 - e. Procedure for conducting meetings or acting without meetings [see § 78.201[2]].
 - f. Percentage vote of members required for committee to act [see § 78.201[2]].

4. State that act of representative in accordance with authority granted under agreement will bind all creditors executing agreement [*see* § 78.201[2]].
5. Provide for compensation for representative [*see* § 78.201[2]]:
 - a. Amount.
 - b. When and how to be paid.
 - c. Expenses, if any, for which representative is to be reimbursed.
6. Set forth duties and authority of representative, which may include [*see* § 78.201[2]]:
 - a. Operate business.
 - b. Supervise operation of business by approving operator's acts [*see* § 78.132].
 - c. Collect payments from debtor under agreement and pay creditors according to agreement.
 - d. Approve or disapprove proposed employment arrangements and contracts.
 - e. Bring lawsuits on behalf of debtor or creditors.
 - f. Settle claims against debtor.
7. Specify which acts will require prior consent of all creditors [*see* § 78.201[2]].
8. Limit representative's liability for performance under agreement to bad faith or willful misconduct, if appropriate [*see* § 78.201[2]].

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts LawDebtor & Creditor Relations



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27-78 California Legal Forms--Transaction Guide § 78.135

AUTHOR: John A. Vos, Practice Consultant

§ 78.135 Defaults by Debtor and Termination of Agreement

1. Define events that will constitute default by debtor under agreement or otherwise permit termination of agreement, such as [*see § 78.201[2]*]:

- a. Failure to make any payment required under agreement.
- b. Failure to perform any other act required under agreement.
- c. Entry of order of relief in bankruptcy case filed by or against debtor.
- d. Assignment for benefit of creditors.
- e. Institution by or against debtor of any bankruptcy, insolvency, reorganization, liquidation, or similar proceeding.
- f. Entry of judgment against debtor in excess of specified dollar amount unless:
 - (1) Covered by insurance; or
 - (2) Vacated within specified period.

2. Describe effect of default by debtor, such as:

- a. Automatic termination of agreement.

- b. Discretionary termination of agreement by creditors or their representative.
- c. Automatic acceleration of debts.

Legal Topics:

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

Contracts LawDebtor & Creditor RelationsContracts LawPerformanceDischarges & Terminations



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27-78 California Legal Forms--Transaction Guide § 78.136

AUTHOR: John A. Vos, Practice Consultant

§ 78.136 Miscellaneous Provisions

1. Provide, as necessary or desired [see Ch. 75, *Formation of Contracts and Standard Contractual Provisions*], for [see § 78.201[2]]:

- a. Delivery of notices.
- b. Status of agreement and exhibits as entire agreement between parties.
- c. Binding effect of agreement.
- d. Governing law.
- e. Effect of headings.

2. Provide, as necessary, for party to execute related instruments concurrently with execution of agreement, such as [see § 78.201[2]]:

- a. Promissory note.
- b. Deed of trust.
- c. Assignment.
- d. Release.

e. Power of attorney.

Legal Topics:

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

Contracts LawContract Conditions & ProvisionsGeneral OverviewContracts LawDebtor & Creditor Relations



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27-78 California Legal Forms--Transaction Guide § 78.137

AUTHOR: John A. Vos, Practice Consultant

§ 78.137 Provisions for Bankruptcy Reorganization Plan

NOTE:

One of the requirements for court confirmation of a Chapter 11 reorganization plan is that the it must comply with applicable provisions of the Bankruptcy Code [*see 11 U.S.C. § 1129(a)(1)*], some of which are mandatory while others are not [*see 11 U.S.C. § 1123*]. This guide is for use as a checklist in drafting or reviewing a nonbankruptcy rehabilitation agreement when counsel intends to have an agreement that would be confirmed as a reorganization plan in a bankruptcy proceeding, should one ensue [*see § 78.12[5]*]. A reorganization plan must contain only provisions that are consistent with the interests of creditors and equity security holders and with public policy with respect to the manner of selection of any officer, director, or trustee under the plan and any successor [*see 11 U.S.C. § 1123(a)(7)*]. Counsel should confirm that the plan otherwise meets confirmation requirements [*see § 78.15[4][f]*].

In a case involving an individual, when the plan is proposed by an entity other than the debtor, counsel must verify that the plan does not provide for the use, sale, or lease of property exempted under the Bankruptcy Code [*see 11 U.S.C. § 522*], unless the debtor consents to that use, sale, or lease.

1. Designate, to extent permitted [*see 11 U.S.C. § 1122*], classes of claims and classes of interest, except:
 - a. Claims for administrative expenses [*see 11 U.S.C. § 507(a)(2)*].
 - b. Certain unsecured claims arising in ordinary course of debtor's business after commencement of bankruptcy case [*see 11 U.S.C. §§ 502(f), 507(a)(3)*]; and
 - c. Taxes [*see 11 U.S.C. § 507(a)(8)*].

2. Specify any class of claims or interests that is not impaired under plan.
3. Specify treatment of any class of claims or interests that is impaired under plan.
4. Provide same treatment for each claim or interest of a particular class, unless holder of particular claim or interest agrees to less favorable treatment of particular claim or interest.
5. Provide adequate means for plan implementation of plan, such as:
 - a. Retention by debtor of all or any part of property of bankruptcy estate.
 - b. Transfer of all or any part of property of estate to one (or more than one) entity, whether organized before or after confirmation of plan.
 - c. Merger or consolidation of debtor.
 - d. Sale of all or any part of property of estate, either subject to or free of any lien, or distribution of all or any part of property of estate among persons having interests in that property.
 - e. Satisfaction or modification of any lien.
 - f. Cancellation or modification of any indenture or similar instrument.
 - g. Curing or waiving of any default.
 - h. Extension of maturity date or change in interest rate or other term of outstanding securities.
 - i. Amendment of debtor's charter.
 - j. Issuance of securities of debtor, or of any transferee entity, for cash, for property, for existing securities, or in exchange for claims or interests, or for any other appropriate purpose.
6. Provide that debtor's corporate charter, if any, or charter of any transferee corporation, must:
 - a. Prohibit issuance of nonvoting equity securities; and
 - b. Provide, as to several classes of securities possessing voting power, appropriate distribution of that power among classes.

NOTE:

This provision must include, in the case of any class of equity securities having preference over another class of equity securities with respect to dividends, adequate provisions for the election of directors representing the preferred class in the event of default in the payment of the dividends [11 U.S.C. § 1123(a)(6)].

7. Optionally provide for [see 11 U.S.C. § 1123(b)]:

- a. Impairment, or nonimpairment, of any class of claims or interests, whether secured or unsecured.
- b. Assumption, rejection, or assignment, subject to specific limitations, of any executory contract or unexpired lease of debtor not previously rejected [*see 11 U.S.C. § 365*].
- c. Settlement or adjustment of any claim or interest belonging to debtor or to estate.
- d. Retention and enforcement by debtor, by trustee, or by representative of estate appointed for this purpose, of any claim or interest belonging to debtor or to estate.
- e. Sale of all or substantially all property of estate, and distribution of proceeds of sale among holders of claims or interests.

Legal Topics:

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

Bankruptcy LawReorganizationsDebtors in PossessionGeneral OverviewBankruptcy LawReorganizationsPlansGeneral OverviewContracts LawContract Conditions & ProvisionsGeneral OverviewContracts LawDebtor & Creditor Relations



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27-78 California Legal Forms--Transaction Guide §§ 78.138-78.199

AUTHOR: John A. Vos, Practice Consultant

[Reserved]

§§ 78.138[Reserved]



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 PART IV. FORMS
 A. Complete Creditors' Agreements

27-78 California Legal Forms--Transaction Guide § 78.200

AUTHOR: John A. Vos, Practice Consultant

§ 78.200 Secured Extension Agreement for Debtor and One Creditor

[1] Comment--Use of Form

The form in [2], below, is an extension agreement between a sole proprietor and one creditor. This agreement is intended for use by a proprietor who is current on payments to all creditors except one important creditor (for example, a major supplier) and finds it necessary to enter into an extension agreement with the creditor in order to continue business operations.

The creditor allows the proprietor an extension of time to pay the full amount of the debt owed to the creditor. The proprietor agrees to pay the debt in installments over the extended time period and to execute a promissory note for the amount of the debt. The form can be modified to require that the promissory note be secured by a deed of trust on real property owned by the proprietor [see § 78.201].

With respect to future business between the proprietor and the creditor, the agreement contains a clause stating that the creditor will continue to supply the proprietor, provided the proprietor pays for the goods within a specified number of days and is current on installment payments under the agreement.

For discussion of types of creditors' agreements, see § 78.12. For agreements with all or most of the creditors of a business, rather than a single creditor, see § 78.201 et seq.

[2] FORM

Secured Extension Agreement for Debtor and One Creditor

EXTENSION AGREEMENT

This agreement is entered into _____[date] by _____[name of proprietor]

("Proprietor"), an individual doing business as _____ [*name of business*], and
 _____ [*name of creditor*] ("Creditor"), a [*status, e.g., a California corporation*].

RECITALS

A. Creditor sold goods consisting of [*general description, e.g., 50 Model XYZ250 computer monitors*] (the "goods") to Proprietor for the total price of \$[*or specify per-unit price or other method of stating cost*].

B. As a condition of that sale, Proprietor promise to pay Creditor for the goods within [*period of time for payment, e.g., 30 days*].

C. Creditor has delivered the goods to Proprietor, but Proprietor has failed to pay for them.

D. Proprietor is unable to pay for the goods at the present time and needs an extension of time to pay.

E. Creditor is willing to allow Proprietor an extension of time to pay the full obligation owed on the terms and conditions specified in this agreement, in consideration of Proprietor executing a promissory note evidencing that obligation.

THE PARTIES THEREFORE AGREE AS FOLLOWS:

1. Description of Debt. Proprietor owes Creditor the sum of \$_____ ("the Debt") for goods sold and delivered by Creditor to Proprietor, and payment on the Debt is now past due.

2. Extension of Time. Creditor shall extend the time for payment of the Debt, provided Proprietor pays the full amount of the Debt in installments on or before _____ [*date*] ("the Due Date"), on the following terms:

(a) The Debt shall bear interest at the annual rate of _____ percent from [*date, e.g., the date of this agreement*] until paid in full.

(b) Proprietor shall make [*number*] equal successive monthly installments of \$_____ each (principal and interest), payable on the same day of each month, commencing _____ [*date*] and continuing until the Due Date of _____ [*date*], at which time the entire unpaid balance of principal and interest on the Debt shall be due and payable.

(c) Proprietor shall have the right, without penalty, to prepay the Debt with all interest then accrued.

3. Promissory Note. Concurrently with execution of this agreement, Proprietor shall execute a promissory note in favor of Creditor in the full amount of the Debt and on the terms and conditions set forth in the preceding paragraph ("the Note").

4. Satisfaction of Debt. On timely payment in full of the Debt and accrued interest in accordance with the terms of the Note and this agreement, Creditor shall return the original Note, marked "Paid in Full," to Proprietor.

5. Default by Proprietor. Proprietor's failure to pay the full amount of any installment required under the Note or this agreement shall constitute a default under this agreement and under the Note. In the event of default by Proprietor, the full amount of the Debt shall be due and immediately payable and Creditor may pursue any and all remedies available to it under law or equity.

6. Future Obligations. Creditor shall continue to supply Proprietor with goods required by Proprietor in the ordinary course of Proprietor's business, provided Proprietor is not then in default under the Note or this agreement and Proprietor pays for the goods in full, in cash, not more than [number, e.g., 30] days after Proprietor's receipt of Creditor's invoice for the goods.

7. Power and Authority to Execute Agreement. Each party has the power to execute this agreement. Each party warrants that the individual signing this document as or for that party is duly and fully empowered and authorized to sign for the purpose of executing this agreement and binding that party to the terms of this agreement.

Executed _____[date].

PROPRIETOR

_____ [signature]

[typed name]

CREDITOR

_____ [name]

By _____ [signature]

[typed name and title]

Legal Topics:

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

Contracts LawContract Conditions & ProvisionsGeneral OverviewContracts LawDebtor & Creditor Relations



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A. Complete Creditors' Agreements

27-78 California Legal Forms--Transaction Guide § 78.201

AUTHOR: John A. Vos, Practice Consultant

§ 78.201 Secured Extension Agreement With Multiple Creditors

[1] Comment

[a] Use of Form

The form in [2], *below*, is an extension agreement by married proprietors and their business creditors. It provides that payment of the claims of the creditors will be deferred in consideration of the proprietors' promissory note and deed of trust. It also provides for the creditors' agent to act as overseer of business operations and periodic payments to the creditors. This type of agreement may be used when the business owners have substantial assets (particularly real property) outside the insolvent business, which can be used to secure their promissory note.

In order to permit the business to continue in operation, the creditors will agree to subordinate their claims to certain debts incurred by the proprietors in the operation of the business. However, the creditors' overseer will have to consent in writing to any new debts exceeding a specified amount. Further, in order to encumber any of their assets, the proprietors will have to obtain the consent of a creditors' committee.

[b] Creditors' Committee and Agent

The agreement contains detailed provisions concerning the formation and actions of a creditors' committee. It also states what activities the creditors' agent may undertake without the prior consent of the creditors' committee; for example, the agent need not obtain consent before settling small claims for their full amount, provided the agent obtains a complete release. This authority permits minor creditors to be fully paid so that they cannot interfere with the agreement by filing an involuntary bankruptcy petition or initiating other legal action against the proprietors [*see § 78.12[1]*].

[c] Bond

The agreement requires the debtor and the creditors' agent to obtain a bond to protect the debtor's business assets against

shortages caused by the debtor, the agent, the creditors' committee, or any of their agents or employees. The agreement treats the cost of the bond as an administrative expense. Any recovery under the bond must be applied to reduce the amount owed to the creditors.

[d] Effectiveness and Term of Agreement

The agreement does not become effective until it has been executed by a minimum number of unsecured creditors. A creditor usually will be unwilling to enter into an extension agreement unless all or substantially all of the other creditors join in the agreement. Otherwise, dissenting creditors could file an involuntary bankruptcy petition or commence lien or other proceedings that would defeat the purpose of the out-of-court agreement.

The term of the agreement is one year and may be extended for six months on the vote of creditors holding at least 75 percent of the outstanding dollar amount of the promissory notes executed under the agreement.

[e] Termination

The creditors may terminate the agreement on the commencement of any bankruptcy proceeding involving the proprietors. Other grounds for termination include lawsuits or foreclosures of liens involving specified amounts, misrepresentation of assets or liabilities, or a drop in value of property securing the promissory notes. On termination, the promissory notes will become immediately due and payable, and the creditors' committee may foreclose under the deeds of trust.

[2] FORM

Secured Extension Agreement With Multiple Creditors

EXTENSION AGREEMENT

This agreement is entered into _____ [date] by _____ and _____ [names of husband and wife] ("the Proprietors"), husband and wife doing business as _____ [name of business], various of their creditors, whose names and signatures (personally or by their authorized agents or representatives) appear at the end of this document ("the Creditors"), and _____ [name of agent] ("the Agent") as agent of the Creditors.

RECITALS

A. The Proprietors are presently unable to pay their debts to the Creditors but expect to be able to pay them in full if allowed an extension of time for payment pursuant to the plan outlined in this agreement.

B. The Creditors are willing to allow the Proprietors an extension of time for payment subject to the terms and conditions outlined in this agreement.

C. The Proprietors agree that the Agent, subject to the direction, supervision, and control of the Creditors' Committee created under this agreement, should supervise the operations of the Proprietors' business for the benefit of the Creditors for the period of this agreement (including any renewals or extensions) until the Proprietors' debts to the Creditors have been fully paid.

D. The Agent is willing to assume that duty for the term of this agreement in accordance with the terms and conditions set forth in this agreement.

THE PARTIES THEREFORE AGREE AS FOLLOWS:

1. Description of Debts. The Proprietors owe debts to the Creditors[, and to certain others who are not signatories to this agreement,] in the amounts set forth in Exhibit A attached to this agreement and incorporated by reference. The Proprietors represent and warrant that they do not owe any debts, including debts for taxes, unemployment insurance contributions, or withholding tax payments, that are not set forth in this agreement.

2. Extension of Time for Payment. The Creditors extend the time for payment of their respective debts for the period described in Paragraph 12(b), on the terms and conditions outlined in this agreement.

3. Security. The Proprietors agree to provide security under this agreement as follows.

(a) The Proprietors shall execute concurrently with the execution of this agreement a promissory note in favor of each Creditor whose signature appears at the end of this agreement ("Notes"). Each promissory note shall be in the amount of the debt owed to the Creditor as set forth on Exhibit A, and shall be in the form set forth in Exhibit B attached to this agreement and incorporated by reference.

(b) To secure the Notes, the Proprietors shall duly execute in recordable form a deed of trust for the benefit of the Creditors in the form set forth in Exhibit C attached to this agreement and incorporated by reference ("Deed of Trust"). The Deed of Trust shall be secured by the real property described in that instrument and owned by the Proprietors ("Real Property").

(c) A certified appraisal of the Real Property is attached to this agreement as Exhibit D and states that the Real Property has an appraised market value, over and above any encumbrances on the Real Property prior to the Deed of Trust or any taxes owed by the Proprietors, in excess of \$_____.

(d) At the Proprietors' expense, the Creditors' interest in the Property shall be insured by _____ [name of title company], subject only to those exceptions listed in the preliminary title report dated _____ and attached to this agreement as Exhibit E.

4. Subordination of Obligations. The Creditors shall accept the Notes and Deed of Trust in full satisfaction of all unsecured debts owed to them by the Proprietors on the date of this agreement. The amounts due to the Creditors, as evidenced by the Notes, shall be subordinate to any subsequent debts incurred by the Proprietors during the term of this agreement, provided that subsequent new debts may be preferred and paid prior to the Notes only to the extent that the new debts are incurred for new value in the ordinary course of business and, as to any particular increase in debt in excess of \$_____, are incurred with the written consent of the Agent.

5. Restrictions on Business Operations. The Proprietors shall not do any of the following without the written approval of the Agent until all the Notes are fully paid:

(a) Increase the wages or salaries of, or otherwise authorize withdrawals to, employees; hire new employees; or discharge employees;

(b) Sell or otherwise dispose of any of inventory, personal property, or equipment.

(c) Borrow money or mortgage or encumber any assets.

(d) Settle, release, or discharge claims against others.

(e) Pay any debts or expenses in the ordinary course of business that exceed \$_____; or

(f) Pay any debts or expenses not in the ordinary course of business.

6. Duties of Proprietors. Until all of the Notes are paid in full, the Proprietors shall do all things and execute all documents necessary to carry out the purpose and intent of this agreement and to protect the Creditors, and in particular shall:

(a) Pay to the Agent, for the benefit of the Creditors, any and all amounts realized by sales of property, inventory, or equipment not in the ordinary course of business, and any and all net income from the business;

(b) Pay on a timely basis all wages and other compensation owed to employees and all related taxes and other charges arising from or relating to employees;

(c) Pay and discharge, prior to the date penalties may be imposed, all federal and state income taxes and all other applicable federal, state, and local taxes or assessments on income, business, or property; and

(d) Furnish the Creditors with a quarterly balance sheet and operating statement for the Proprietors' business within a reasonable period after the end of each calendar quarter.

The Creditors agree that any and all payments made under clause (a) shall be credited against the amounts payable under the Notes.

7. Creditors' Committee. A creditors' committee ("the Committee") composed of _____[*name*] of [*company*] and [*number, e.g., two*] other persons to be elected by majority vote of the Creditors shall be established to supervise the performance of this agreement. The Creditors authorize the Committee to act for them, directly and through subcommittees or agents, in all matters relating to this agreement. The Creditors shall be bound by all actions taken or directed by the Committee, and neither the Committee nor any member of it shall be liable for any good faith decision, act, or failure to decide or act.

8. Committee Procedures. The Committee shall observe the following requirements governing procedures.

(a) All decisions of the Committee shall be by vote of a majority of its members, except when this agreement requires a higher vote or the Committee authorizes a subcommittee of its members to make decisions on its behalf. If any member of the Committee resigns or is unable to act, the remaining members may substitute any other of the Creditors as a member of the Committee. Any member of the Committee may vote by written proxy, which may designate any person, whether or not a member of the Committee.

(b) The Committee shall elect a chairperson, who shall call meetings of the Committee from time to time as he or she may deem necessary. Any [*number*] members of the Committee, or any persons representing _____ percent of the total amount of debt owed by the Proprietors to those Creditors whose signatures appear at the end of this document, as those amounts are set forth in Exhibit A, may also call a Committee meeting. No Committee meeting shall be effective unless each member of the Committee is given at least three days advance written notice of the meeting, or unless each member that has not been notified in the foregoing manner delivers a written waiver of notice to the Committee before or after the meeting.

9. Duties of Agent. The Agent shall faithfully serve as agent and fiduciary for the Creditors in supervising the Proprietors' business, as provided in Paragraph 5 of this agreement, and in paying to the Committee, or to an account established by the Committee for the benefit of the Creditors, all sums paid to the Agent by the Proprietors under this agreement. The Agent will not directly or indirectly profit from the exercise of the Agent's authority under this agreement except as provided in Paragraph 10 of this agreement. The Agent shall be subject at all times to the control of

the Committee, shall take any actions requested by the Committee, and shall, as a general rule, obtain the consent of the Committee before taking any action. The Agent may perform the following tasks without obtaining the prior consent of the Committee:

(a) Authorize contracts or obligations by the Proprietors involving periods of less than [number] days and financial obligations or expenditures of less than \$ _____; and

(b) Authorize the Proprietors to settle and discharge claims on the Proprietors' books for amounts of not more than \$ _____ each, provided, in each case, the whole claim shall be discharged by the payment and the persons so paid shall furnish the Proprietors with a complete release of all claims against the Proprietors up to and including the time of payment.

10. Remuneration of Agent. The Proprietors shall pay the Agent the reasonable expenses incurred by the Agent in connection with the administration of this agreement, including any reasonable payments to accountants, management consultants, efficiency experts, or other experts that the Committee directs the Agent to consult with or employ to carry out the purposes of this agreement. At the time a Note is paid in full, the holder of that Note shall pay the Agent _____ percent of the face amount of that Note.

11. Liability and Bond. The Proprietors alone are liable for any losses incurred from operations of the business during the term of this agreement. Neither the Creditors, the Committee, nor the Agent shall be liable for any such losses or for any good faith errors in judgment or good faith omissions to act. For these purposes, the word "losses" shall include (without limitation) losses, claims, or liabilities of any kind arising from breach of contract, breach of warranty on products, or negligence. The Proprietors or the Agent or both shall obtain a bond, satisfactory to the Committee, which will protect the Proprietors' business and assets against embezzlements or other shortages by the Proprietors, the Agent, the Committee, or any agent or employee of any of them. The cost of the bond shall be considered an administrative expense under this agreement. Any amounts that shall be collected by the Proprietors under the bond shall inure to the benefit of and be paid to the Creditors, pro rata, to reduce the amounts owed to them under the Notes.

12. Commencement and Renewal of Agreement. The following provisions govern the effectiveness of this agreement:

(a) This agreement shall become effective when it is executed by unsecured creditors holding claims aggregating at least _____ percent of the amount of the Proprietors' total unsecured indebtedness as set forth in Exhibit A, excluding, for purposes of computing the required percentage, all claims under \$[amount that agent may settle and discharge under Paragraph 9(b)].

(b) This agreement shall be effective for one year from the date of execution of this agreement by the last of the Creditors required for the agreement to be effective ("Original Termination Date"). Thereafter, it shall automatically terminate unless the Committee elects in writing, at least 30 days before the Original Termination Date, to extend the term of the agreement for an additional six months ("Extended Term"). The election to extend the agreement for the Extended Term shall require the affirmative vote or written consent of the Creditors holding 75 percent of the dollar amount then outstanding on the Notes issued under this agreement. Extension of this agreement shall extend the term of this agreement and shall also extend accordingly the due date of the Notes issued to the Creditors under this agreement.

13. Termination of Agreement. The Committee may terminate this agreement by written notice to the Proprietors on the occurrence of any of the following:

(a) Commencement of any voluntary or involuntary proceedings involving the Proprietors under the Bankruptcy Code;

(b) Commencement of any action against the Proprietors (at law or in equity) to collect or enforce payment of any

claims involving amounts exceeding \$_____;

(c) Commencement of any proceedings by a secured creditor to foreclose any lien against any of the Proprietors' assets with depreciated book value exceeding \$_____;

(d) Failure or refusal of the Proprietors to comply with any obligation undertaken under this agreement;

(e) Discovery of any information that reasonably indicates that the Proprietors misrepresented their assets or liabilities; or

(f) A drop in value of the real property securing the Deed of Trust that causes the value of the property (less liens prior to the Deed of Trust) to be appraised at less than \$_____, unless the Proprietors, within [number] days and for the benefit of the Creditors, secure the Deed of Trust with sufficient additional real property to bring the total value of the Creditors' security (less liens prior to the Deed of Trust) back to a minimum of \$_____.

14. Disbursements to Creditors. During the term of this agreement, the Committee shall collect from the Agent all amounts paid to the Agent by the Proprietors under Paragraph 6 and shall either pay those amounts directly to the Creditors (in proportion to their interests as shown in Exhibit A) or deposit those amounts in an interest-bearing account established for the benefit of the Creditors if the Committee deems the amounts paid to it by the Agent too small for practical disbursement to the Creditors. The Committee shall disburse to the Creditors (in proportion to their interests as shown in Exhibit A) all amounts in the account whenever the account is large enough to permit practical distribution of those amounts or, in any event, at the termination of this agreement pursuant to Paragraph 12. Any amounts so disbursed to the Creditors shall be subtracted from the amounts owed to the Creditors under this agreement on the Notes. The Notes shall become immediately due and payable on expiration of the term of this agreement or on its termination pursuant to Paragraph 13. If the Notes are not paid in full at that time, the Creditors authorize the Committee to promptly commence foreclosure proceedings on the Deed of Trust for the benefit of the Creditors, in order to repay the Creditors all amounts then owed them under the Notes.

15. Binding Effect. This agreement, when effective, shall be binding on the parties and their legal representatives, successors, and assigns.

16. Entire Agreement. This agreement supersedes all agreements previously made between the parties relating to its subject matter. There are no other understandings or agreements between them.

17. Notices. All notices or other documents under this agreement shall be in writing and be delivered personally or mailed by first class mail, postage prepaid, to the parties at their last known addresses.

18. Nonwaiver. No delay or failure by a party to exercise any right under this agreement, and no partial or single exercise of that right, shall constitute a waiver of that or any other right, unless this agreement provides otherwise.

19. Headings. Headings in this agreement are for convenience only and shall not be used to interpret or construe its provisions.

20. Governing Law. This agreement shall be construed in accordance with the laws of the state of California.

21. Counterparts. This agreement may be executed in two or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument.

22. Power and Authority to Execute Agreement. Each party has power to execute this agreement. Each party

warrants that the individual signing this document as or for that party is duly and fully empowered and authorized to sign for the purpose of executing this agreement and binding that party to the terms of this agreement.

Executed _____[*date*].

PROPRIETORS

_____ [*signature*]
[*typed name*]

_____ [*signature*]
[*typed name*]

AGENT

_____ [*signature*]
[*typed name*]

[*Include separate signature block for each creditor as follows:*]

CREDITOR

_____ [*name*]
By _____ [*signature*]
[*typed name and title*]

[*Continue with the following:*]

Exhibit A
Schedule of Proprietors' Debts

Name and Address of Creditor	Total Amount of Debt	Description and Terms of Debt
_____	\$_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	\$_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____

_____	\$	_____
_____	_____	_____

_____	\$	_____
_____	_____	_____

_____	\$	_____
_____	_____	_____

_____	\$	_____
_____	_____	_____

	TOT \$	_____
	AL	_____

Exhibit B
Form of Promissory Note

[Attach form of promissory note to be executed by Proprietor in favor of each creditor]

Exhibit C
Form of Deed of Trust

[Attach form of deed of trust to be executed by Proprietor]

Exhibit D
Certified Appraisal of Real Property

[Attach copy of certified appraisal of real property owner by Proprietors that is to be subject to deed of trust under terms of creditors' agreement]

Exhibit E
Preliminary Title Report

[Attach copy of preliminary title report on real property owner by Proprietors that is to be subject to deed of trust under terms of creditors' agreement]

Legal Topics:

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

Contracts LawContract Conditions & ProvisionsGeneral OverviewContracts LawDebtor & Creditor Relations



153 of 172 DOCUMENTS

California Legal Forms--Transaction Guide

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DIVISION V: CONTRACTS AND OBLIGATIONS
CHAPTER 78 CREDITORS' AGREEMENTS: NONBANKRUPTCY ALTERNATIVES
PART IV. FORMS
A. Complete Creditors' Agreements

27-78 California Legal Forms--Transaction Guide § 78.202

AUTHOR: John A. Vos, Practice Consultant

§ 78.202 Agreement for Creditors' Forbearance and Supervision of Debtor's Business

[1] Comment

[a] Use of Form

The form in [2], *below*, is an extension agreement between creditors and a partnership that agrees to permit a creditors' committee to supervise the operation of the partnership's business. The creditors agree to forbear enforcement of their claims against the partnership for a stated time, with one optional extension period, or until the occurrence of certain events. Otherwise, the agreement provides that it will continue in effect until the creditors executing the agreement have been paid in full.

[b] Effectiveness of Agreement

The agreement does not become effective until it has been executed by a minimum number of creditors. A creditor usually would be unwilling to enter into an extension agreement unless all or substantially all of the other creditors joined in the agreement. Otherwise, dissenting creditors could file an involuntary bankruptcy petition or commence lien or other proceedings that would defeat the purpose of the out-of-court agreement.

[c] Creditors' Committee

The agreement contains detailed provisions regarding the appointment of members of a creditors' committee and procedures for actions by the committee. The powers of the committee are broad and extend to virtually all aspects of the partnership's business, including the right to settle relatively small claims. Creditors may insist on such a provision in order to prevent holders of small claim from blocking the effectiveness of the out-of-court agreement.

[d] Restrictions on Operation of Business

Because the powers of the creditors' committee are so extensive, the provisions regarding the operation of the partnership's business are quite restrictive. Common restrictive provisions prohibit creating any liens on property and selling or otherwise disposing of any property during the term of the agreement. Further, because the agreement imposes special obligations on the individual partners.

[e] Liquidation of Debts

Consistent with the broad powers of the creditors' committee is the discretion to liquidate the debts at times the committee deems appropriate, but proportionally among the creditors. The agreement further provides that any creditor with a security interest, on becoming a party to the agreement, need not account to the other creditors executing the agreement for the security or proceeds realized from the security. However, in computing the amount of the debt to be paid to the secured creditor under the agreement, the value of the security must be subtracted.

[2] FORM

Agreement for Creditors' Forbearance and Supervision of Debtor's Business

EXTENSION AGREEMENT

This agreement is entered into _____ [date] by _____ and _____ [names of partners] ("the Partners"), individually and doing business as _____ [name of partnership] ("the Partnership"), a California general partnership, and various of their creditors, whose names and signatures (personally or by their authorized agents or representatives) appear at the end of this document ("the Creditors").

RECITALS

A. The Partnership has been and is now engaged in the business of [describe type of business], is indebted to the Creditors in various sums, and by reason of the insufficiency of ready funds is and will be unable to meet its debts as they mature.

B. The Partnership has requested forbearance on the part of the Creditors for the time and under the terms and conditions set forth in this agreement, in the belief that the Partnership's assets eventually will be sufficient to meet all of its outstanding obligations and liabilities, and that forbearance will tend to bring about more prompt payment in full of the indebtedness and will not adversely affect the interests of the Creditors.

C. The primary purpose of this agreement is to liquidate the existing indebtedness of the Partnership in whatever lawful manner and at whatever times the Committee in its discretion deems most beneficial to the interest of the Creditors.

THE PARTIES THEREFORE AGREE AS FOLLOWS:

1. Description of Debts. The Partnership owes debts to the Creditors[, and to certain others who are not signatories to this agreement,] in the amounts set forth in Exhibit A attached to this agreement and incorporated by reference. The Partnership represents and warrants that it does not owe any debts, including debts for taxes, unemployment insurance contributions, or withholding tax payments, that are not set forth in this agreement.

2. Appointment of Committee. _____ [names and creditor affiliations of initial committee members], and their successors appointed as provided by this agreement, are designated by the Creditors and accepted by the Partnership as a creditors' committee ("the Committee") under this agreement.

3. Committee Vacancies. Any vacancy on the Committee occurring by resignation, death, or otherwise may be filled as follows: *[specify who will succeed each committee member, or otherwise describe how successors will be selected]*. The party appointing the successor of any member of the Committee shall submit to the Committee a signed written notice of the appointment. If a successor is not appointed in accordance with the foregoing procedure within *[number]* business days after notice from the Committee to make the appointment, the chairperson of the Committee or the Committee may designate a successor. Every successor shall have all the rights, powers, duties, and immunities of a member under this agreement, to the same extent and with the same effect as if the successor were named in this agreement as a member of the Committee. Any member of the Committee may resign at any time by submitting to the Committee a written notice of resignation.

4. Committee Procedure. The Committee shall adopt rules of procedure as deemed necessary by the Committee. It may choose a member to act as chairperson and may choose a member, or appoint any person, as secretary. Action by the Committee shall be taken by a majority of the members, either at a meeting or in writing without a meeting. Members of the Committee shall not receive compensation for their services.

5. Committee Agents. The Committee may employ, fix the compensation of, and pay attorneys, accountants, custodians, or other representatives to supervise the affairs of the Partnership, and other agents who may do or perform any acts on behalf of the Committee that it is authorized to perform. The Committee shall be reimbursed for all legal or other expenses incurred by it in creating, bringing into operation, or carrying out the provisions of this agreement. It shall also be reimbursed for reasonable compensation paid for the services of all attorneys, accountants, and agents employed by it. The Committee shall have the power to fix reasonable compensation of counsel employed by the Partnership in connection with this agreement. The Partnership shall pay the foregoing expenses and compensation on the demand of the Committee and prior to the payment of existing indebtedness.

6. General Powers of Committee. In furtherance of the purpose of this agreement and in addition to the Committee's rights and duties conferred or imposed by any other provision of this agreement, the Committee is empowered to do all things on behalf of the Creditors permitted under the terms of this agreement that in its absolute discretion it deems necessary or expedient for the maintenance and protection of the Creditors' rights and interests. Without limiting the foregoing, the Committee shall have power to do any of the following, any of which shall be binding on the Creditors:

- (a) Inspect the Partnership's books and records and conduct other investigations of the Partnership's business affairs and interest;
- (b) Suggest, prescribe, or approve policies governing the collection of the Partnership's assets;
- (c) Approve or disapprove all proposed employment arrangements, contracts, and commitments to be made by the Partnership;
- (d) Bring any suits, actions, or other proceedings in the name of the Committee, or in the name of the Partnership, that the Committee determines in its absolute discretion to be in the best interests of the Creditors;
- (e) Recommend or disapprove the sale of any or all of the Partnership's assets and goodwill, either as a going concern, in liquidation, or otherwise, or any other arrangements and agreements in reference to the Partnership's assets, the carrying on of the Partnership's business, the curtailing of that business, the liquidation of the Partnership's indebtedness, the liquidation of the Partnership's assets, and otherwise;
- (f) Determine when, under the provisions of this agreement, the existing indebtedness shall be declared and become due and payable, and make distributions to the Creditors as provided in this agreement; and
- (g) Authorize and instruct the Partnership to pay, adjust, or settle any claim not exceeding \$ _____,

owed to any creditor of the Partnership, and settle any dispute as to the amount of any claim or demand against the Partnership.

7. Obligation of Partnership. The Partnership shall conduct its business and affairs so as fully to preserve the rights and interests of the Creditors against it and in and to the assets of the Partnership, in accordance with the terms of this agreement. Until payment of the existing indebtedness in full, the Partnership shall make no payment on account of capital, shall create no liens or charges on, or make any sale or other disposition of, any of its assets, and shall make no expenditure and incur no liability except with the approval of the Committee. The Partnership shall follow the suggestions and directions of the Committee in connection with the operation of the business; however, nothing in this agreement shall be construed to make the Committee or any of its members liable for any liability incurred by reason of those suggestions and directions.

8. Obligation of Partners. The Partners, or any of the Partners, at any time the Committee may request, shall consult and confer with the Committee on any matters concerning the Partnership's business, property, and affairs. The Committee and its attorneys, accountants, and agents shall at all reasonable times have full access to the Partnership's books and records. The Partnership shall submit to the Committee, at its request at any time, full and accurate reports of its business operations and financial condition. The Partnership shall also at the request of the Committee, and at its own cost and expense, cause an audit of its business and affairs to be made by an accountant acceptable to the Committee, and promptly furnish a copy to the Committee and its members.

9. Liquidation of Debts. The Partnership shall liquidate the existing indebtedness owing to the Creditors by proportional payments at any times and in any amounts that the Committee in its discretion determines and directs. Nothing contained in this agreement shall be construed to require any of the Creditors to account for any security of any kind acquired by the Creditor before the date of this agreement, or for the proceeds ultimately realized from any such security, regardless of when the proceeds are realized. For purposes of this agreement, the claim of any of the Creditors holding security shall be deemed to be equal to the excess of the full debt over the value of the security. On payment in full by or on behalf of the Partnership to the Creditors of the amounts of their respective claims against the Partnership, and on payment of all other amounts required under the terms of this agreement, this agreement shall terminate.

10. Priority of Future Debts. The purchases made by the Partnership, and any loans made to the Partnership on and after the date of execution of this agreement with the approval of the Committee, shall have priority over the indebtedness owing to the Creditors as of the date of execution of this agreement.

11. Forbearance by Creditors. Each of the Creditors agrees with the others, and with the Committee, but not with any other parties to this agreement, to forbear for [*period, e.g., one year*] from the date of execution of this agreement (the "Period of Forbearance") to initiate or prosecute, or otherwise enforce, any obligation of the Partnership now or hereafter existing, by any suit or action against the Partnership, except as provided in Paragraph 13.

12. Reservation of Rights Against Third Parties. Neither the forbearance of the Creditors nor the extension of time allowed to the Partnership by the terms of this agreement, nor any representations, covenants, or any other provision of this agreement, shall operate as a waiver or release with respect to any persons, firms, corporations, or other entities primarily or secondarily liable to the Creditors as endorsers or guarantors, or as undisclosed partners, or in any other way, and obligations of those parties shall continue in effect to the same extent as though this agreement did not exist. As to those parties, the Creditors expressly reserve the full right of recourse.

13. Termination and Extension of Period of Forbearance. (a) The Committee may terminate the Period of Forbearance by giving a written termination notice to the Partnership and to the Creditors, on the occurrence of any of the following:

- (1) Commencement of any voluntary or involuntary proceedings against the Partnership or any of the

Partners under the Bankruptcy Code;

(2) Commencement of any action against the Partnership or any of the Partners, at law or in equity, to collect or enforce any claim exceeding \$ _____;

(3) Commencement of any proceedings by a secured creditor to foreclose any lien against any assets of the Partnership or of any of the Partners with depreciated book value exceeding \$ _____; or

(4) Failure or refusal of the Partnership or any of the Partners to comply with any obligation imposed under this agreement.

(b) On the vote or written consent of at least _____ percent in number and in amount of claims of the Creditors executing this agreement, the Period of Forbearance may be terminated, or it may be extended for one additional six-month period beyond that expiration date. The Creditors shall give written notice of either action to the Partnership within 48 hours of the action. The early termination of the Period of Forbearance shall take effect [*specify when action is effective*]. If the Creditors elect to extend the Period of Forbearance, they shall provide the Partnership with the required notice of election at least 30 days before the expiration date set forth in Paragraph 11.

14. Limitation of Committee's Acts and Liability. In acting under this agreement, the Committee shall be deemed to act as agent for the Creditors, and not for any other person, firm, or corporation. No provision of this agreement shall be construed to vest in the Committee title to any assets of the Partnership, nor shall the Committee be deemed to be either a trustee or an assignee of any assets of the Partnership. Neither the Committee nor any of its members shall be responsible in any manner for the performance of this agreement on the part of any of the parties to this agreement, for the accomplishment of any purpose of this agreement, for the results of anything done pursuant to this agreement, for any mistakes of fact or in law, for any negligence, errors, or omissions in connection with this agreement, or for the act or omission of any agent, employee, or person to whom power or authority may be delegated in good faith under this agreement. No member of the Committee shall be liable for the act or omission of any other member of the Committee, or for the member's own acts except affirmative bad faith or willful misconduct.

15. Waiver. The waiver or release by the Committee or the Creditors of performance by the Partnership under any term of this agreement shall not operate as a waiver or release of performance under other terms of this agreement.

16. Additional Instruments. The Partnership shall execute any agreements and other instruments that may be necessary to effectuate the purposes of this agreement.

17. Notice. Any notice that may or must be given under this agreement shall be sufficient if and when mailed by first class mail, postage prepaid, addressed as follows: [*specify for each party*].

18. Effective Date of Agreement. This agreement shall be immediately operative as to all parties executing this agreement. However, the Committee may terminate this agreement and release all parties from their obligations under it unless at least _____ percent of all creditors of the Partnership in number and amount of claims, shall have executed this agreement not later than _____ [*date*].

19. Binding Effect. This agreement, when effective, shall be binding on the parties and their respective legal representatives, successors, and assigns.

20. Entire Agreement. This agreement supersedes all agreements previously made between the parties relating to its subject matter. There are no other understandings or agreements between them.

21. Nonwaiver. No delay or failure by a party to exercise any right under this agreement, and no partial or single exercise of that right, shall constitute a waiver of that or any other right, unless otherwise expressly provided in this agreement.

22. Headings. Headings in this agreement are for convenience only and shall not be used to interpret or construe its provisions.

23. Governing Law. This agreement shall be construed in accordance with the laws of the state of California.

24. Counterparts. This agreement may be executed in two or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument.

25. Power and Authority to Execute Agreement. Each party has power to execute this agreement. Each party warrants that the individual signing this document as or for that party is duly and fully empowered and authorized to sign for the purpose of executing this agreement and binding that party to the terms of this agreement.

Executed _____ [date].

PARTNERS

_____ [signature of partner]

[typed name]

_____ [signature of partner]

[typed name]

PARTNERSHIP

_____ [name]

By _____ [signature of partner]

[typed name], Partner

CREDITORS' COMMITTEE

_____ [signature of member]

[typed name]

_____ [signature of member]

[typed name]

_____ [signature of member]

[typed name]

CREDITORS

[Add signature blocks for each creditor as follows:]

_____ [name]

By _____ [signature]

[typed name and title]

Legal Topics:

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

Business & Corporate Law Corporations General Overview Contracts Law Consideration Enforcement of Promises Forbearance Contracts Law Contract Conditions & Provisions General Overview Contracts Law Debtor & Creditor Relations



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DIVISION V: CONTRACTS AND OBLIGATIONS
 CHAPTER 78 CREDITORS' AGREEMENTS: NONBANKRUPTCY ALTERNATIVES
 PART IV. FORMS
 A. Complete Creditors' Agreements

27-78 California Legal Forms--Transaction Guide § 78.203

AUTHOR: John A. Vos, Practice Consultant**§ 78.203 Agreement Extending Time for Payment of Note and Adding Guarantor****[1] Comment--Use of Form**

The form in [2], below, is an extension agreement under which the creditor agrees to extend the debtor's time to pay a promissory note, and a third party agrees to guarantee the note. For discussion of the law of guaranty, including consideration requirements and the obligations of a guarantor, see Ch. 79, *Suretyship, Guaranty and Indemnity*.

[2] FORM**Agreement Extending Time for Payment of Note and Adding Guarantor****AGREEMENT**

This agreement is made _____ [date] by _____ [name and legal status of debtor] ("the Debtor"), _____ [name and legal status of creditor] ("the Creditor"), and _____ [name and legal status of guarantor] ("the Guarantor").

RECITALS

A. The Debtor is indebted to the Creditor on a promissory note, dated _____ [date note was executed], in the face amount of \$ _____ (the "Note"), which bears interest at the rate of _____ percent per annum. The Note is now past due.

B. The Debtor has requested that the Creditor extend the time for payment of the Note.

C. To induce the Creditor to grant the extension of time, the Guarantor is willing to guarantee payment of the Note.

THE PARTIES THEREFORE AGREE AS FOLLOWS:

1. Acknowledgment of Debt. The Debtor is indebted to the Creditor, without any defense, offset, or counterclaim, in the principal sum of \$_____, plus interest at _____ percent per annum on that sum from _____[*date interest began to accrue*] (the "Debt"), as evidenced by the Note.

2. Extension of Time. The Creditor hereby extends the time for payment of the Note for a period of one year from the date of execution of this agreement. The Creditor shall write the fact of this extension on the Note. Notwithstanding anything in this agreement to the contrary, the Note shall be immediately due and payable on the occurrence of any of the following:

- (a) Execution by the Debtor of an assignment for the benefit of creditors;
- (b) Appointment of a receiver for the Debtor's property;
- (c) Filing of a petition under any provision of the Bankruptcy Code by or against the Debtor;
- (d) Attachment of any of the Debtor's property;
- (e) Occurrence of any of the preceding events with respect to the Guarantor; or
- (f) Death of the Guarantor.

3. Guaranty. The following provisions shall govern the Guarantor's participation in this agreement:

(a) The Guarantor unconditionally guarantees to the Creditor, and to every subsequent holder of the Note, the prompt payment of the Note when due (whether at maturity, by acceleration, or otherwise), irrespective of any question as to the authenticity, validity, regularity, or enforceability of the Note or of any liability or obligation actually or purported to be evidenced or imposed by the Note, or the enforceability of any collateral security for the Note, or the existence or extent of any such collateral security.

(b) The Guarantor agrees that, without notice to or further consent of the Guarantor and without any such action in any way or to any extent releasing, extinguishing, reducing, or otherwise affecting the liability and obligations of the Guarantor set forth in this agreement:

(1) The time of payment of the Note may be accelerated or further extended, or one or more new notes or other instruments may be taken in exchange for or replacement or renewal of the Note, or any other indulgence may be granted with respect to the Note.

(2) Collateral security or additional collateral security may be accepted to secure payment of the Note.

(3) Any collateral security for the Note may be taken, enforced, exchanged, surrendered, modified, released, or altered, or otherwise dealt with, in whole or in part, in any manner.

(c) To the full extent permitted by law, the Guarantor waives any presentment, demand of payment from the Debtor or anyone else, protest, and notice of presentment, demand, nonpayment, or protest, and any and all other protests, notices, and demands. The Guarantor agrees that its obligations under this agreement are not in any way to be reduced or affected by any failure on the part of the Creditor, or any holder of the Note, to take any action to enforce the Note, or to pursue any remedy for the nonpayment, or to enforce, protect, or preserve any collateral security.

4. Binding Effect. This agreement, when effective, shall be binding on the parties and their respective legal representatives, successors, and assigns.

5. Entire Agreement. This agreement supersedes all agreements previously made between the parties relating to its subject matter. There are no other understandings or agreements between them.

6. Notices. All notices or other documents under this agreement shall be in writing and delivered personally or mailed by first class mail, postage prepaid, to the parties at their last known addresses.

7. Nonwaiver. No delay or failure by a party to exercise any right under this agreement, and no partial or single exercise of that right, shall constitute a waiver of that or any other right, unless this agreement provides otherwise.

8. Headings. Headings in this agreement are for convenience only and shall not be used to interpret or construe its provisions.

9. Governing Law. This agreement shall be construed in accordance with the laws of the state of California.

10. Counterparts. This agreement may be executed in two or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument.

11. Power and Authority to Execute Agreement. Each party has power to execute this agreement. Each party warrants that the individual signing this document as or for that party is duly and fully empowered and authorized to sign for the purpose of executing this agreement and binding that party to the terms of this agreement.

Executed _____[*date*].

DEBTOR

_____[*signature*]

[*typed name*]

CREDITOR

_____[*signature*]

[*typed name*]

GUARANTOR

_____[*signature*]

[*typed name*]

Legal Topics:

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

Contracts LawContract Conditions & ProvisionsGeneral OverviewContracts LawDebtor & Creditor Relations



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27-78 California Legal Forms--Transaction Guide § 78.204

AUTHOR: John A. Vos, Practice Consultant

§ 78.204 Creditor's Agreement to Delay Enforcement of Mechanic's Lien

[1] Comment

[a] Use of Form

The form in [2], *below*, is an agreement that a creditor having a mechanic's lien, without giving up any statutory rights with respect to enforcing the lien, will temporarily forgo an action to foreclose the lien during a limited payment-extension period. In consideration of the extension, the debtor and an accommodation party [*see Com. Code § 3419*] will deliver to the creditor a promissory note for the amount of the debt.

[b] Mechanic's Lien and Extension Agreement

If a lien claimant is required by statute to give a preliminary 20-day notice [*see CC § 3097*], the giving of that notice and proper proof of service [*see CC § 3097.1*] are prerequisites to enforcement of a mechanic's lien [*see CC § 3114*]. The time within which a claimant must record a claim of lien depends on whether a notice of completion or notice of cessation has been recorded and whether the claimant is the original contractor [*see CC § 3115*], a subcontractor, or some other person [*see CC § 3116*]. Different time requirements also apply when the work of improvement requires two or more original contracts [*see CC § 3117*].

This agreement assumes that the claimant has recorded the claim of lien. The lien created by the recording of the claim of lien will expire 90 days after the claim is recorded unless within that time the claimant either files an action to foreclose the lien in the proper court or makes and records an agreement that extends the time the mechanic's lien will bind the subject property [*CC § 3144*]. An owner or original contractor may not waive, affect, or impair the claims and liens of other persons without obtaining their written consent [*see CC § 3262*].

If the mechanic's lien creditor makes and records an extension agreement before the expiration of the 90-day period for filing a foreclosure action, then the lien continues in force until 90 days after the expiration of the extension, but in no

case longer than one year from the time of completion of the work of improvement [see CC § 3144(a)]. The extension is not effective against bona fide purchasers who acquire their rights subsequent to the expiration of the 90-day period following the recordation of the claim of lien, unless the agreement or notice of it is recorded prior to the acquisition of rights by the bona fide purchaser [see CC § 3145].

For detailed discussion of the law governing mechanics' liens, see Ch. 31, *Mechanics' Liens* .

[2] FORM

Creditor's Agreement to Delay Enforcement of Mechanic's Lien

EXTENSION AGREEMENT

This agreement is made _____[date] by _____[name and legal status of debtor] ("the Debtor"), _____[name and legal status of creditor] ("the Creditor"), and _____[name and legal status of accommodation party on promissory note] ("the Third Party").

RECITALS

A. For work, labor, and services performed, and materials furnished, in connection with [describe real property improvement], the Debtor owes the Creditor the amount of \$_____, plus interest from _____[date].

B. The Creditor duly recorded a claim of lien on _____[date] in the office of the county recorder of _____[name] County, California, against the work of improvement and real property. The statutory period within which the Creditor has a right to commence an action to foreclose that lien expires on [last day to commence action; see CC § 3144 and Ch. 31, *Mechanics' Liens*].

C. The Debtor is presently unable to pay the debt but will be able to pay the debt if allowed an extension of time to _____[expiration date set forth in preceding recital].

D. The Debtor and the Third Party, in order to induce the Creditor to delay the commencement of an action to foreclose the claimed lien until that date, are willing to assure payment of the debt without impairing any of the Creditor's rights and remedies.

THE PARTIES THEREFORE AGREE AS FOLLOWS:

1. Promissory Note. Concurrently with the execution of this agreement, the Debtor and the Third Party shall execute and deliver to the Creditor a promissory note in the face amount of \$_____, with interest at _____ percent per annum from _____[date interest began to accrue on debt], and a due date of _____[specify date prior to statutory deadline for commencement of action] (the "Note").

2. Delayed Foreclosure of Mechanic's Lien. The Creditor shall not commence an action to recover the debt before _____[date]. At that time, if the debt has not been paid in full, the Creditor shall have the right to commence an action to foreclose the claimed lien.

3. Reservation of Rights. This agreement shall not prejudice any of the rights or remedies of the Creditor and shall not be deemed to be a waiver of any remedy that the Creditor may have against the Debtor or under California law, except as otherwise provided in this agreement.

4. Binding Effect. This agreement, when effective, shall be binding on the parties and their respective legal representatives, successors, and assigns.

5. Entire Agreement. This agreement supersedes all agreements previously made between the parties relating to its subject matter. There are no other understandings or agreements between them.

6. Notices. All notices or other documents under this agreement shall be in writing and delivered personally or mailed by first class mail, postage prepaid, to the parties at their last known addresses.

7. Nonwaiver. No delay or failure by a party to exercise any right under this agreement, and no partial or single exercise of that right, shall constitute a waiver of that or any other right, unless this agreement provides otherwise.

8. Headings. Headings in this agreement are for convenience only and shall not be used to interpret or construe its provisions.

9. Governing Law. This agreement shall be construed in accordance with the laws of the state of California.

10. Counterparts. This agreement may be executed in two or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument.

11. Power and Authority to Execute Agreement. Each party has power to execute this agreement. Each party warrants that the individual signing this document as or for that party is duly and fully empowered and authorized to sign for the purpose of executing this agreement and binding that party to the terms of this agreement.

Executed _____[date].

DEBTOR

_____ [signature]

[typed name]

CREDITOR

_____ [signature]

[typed name]

THIRD PARTY

_____ [signature]

[typed name]

[Add acknowledgment to make document recordable.]

Acknowledgment State of California County of _____

On [date], before me _____ [name and title of officer taking acknowledgment], personally appeared _____ [name(s) of person(s) signing instrument], who proved to me on the basis of satisfactory evidence to be the person[s] whose name[s] [is or are] subscribed to the within instrument and acknowledged to me that [she or he or they] executed the same in [her or his or their] authorized [capacity or capacities], and that by [her or his or their] [signature or signatures] on the instrument, the person[s] or the entity upon behalf of which the person[s] acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature _____ [Seal]

Legal Topics:

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

Contracts Law Debtor & Creditor Relations Real Property Law Nonmortgage Liens Mechanics' Liens



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 A. Complete Creditors' Agreements

27-78 California Legal Forms--Transaction Guide § 78.205

AUTHOR: John A. Vos, Practice Consultant

§ 78.205 Composition Agreement--Debt Partially Paid in Installments

[1] Comment

[a] Use of Form

The form in [2], *below*, is a composition agreement with creditors. It provides that the debtor will pay each participating creditor a percentage of that creditor's total claim in return for the creditor's release of the claim. The payment of only a percentage of a creditor's claim distinguishes composition agreements from extension agreements [*see* § 78.12[2][a], [b]]. For a composition agreement that uses a trustee, see § 78.206. For illustrative extension agreements, see §§ 78.200-78.204.

[B] Effectiveness of Agreement

The agreement does not become effective until it has been executed by a minimum number of creditors. A creditor usually would be unwilling to enter into a composition agreement unless all or substantially all of the other creditors joined in the agreement. Otherwise, dissenting creditors could file an involuntary bankruptcy petition or commence lien or other proceedings that would defeat the purpose of the out-of-court agreement.

For a discussion of the tax consequences to debtors and creditors under composition agreements, see § 78.14.

[c] Consideration for Compromise

The consideration flowing to each creditor is the debtor's promise to make the payments described in the agreement as well as the agreement of the other creditors to compromise their claims [*see* *Wilson v. Samuels* (1893) 100 Cal. 514, 520, 35 P. 148] .

[d] Good Faith of Parties Required

The debtor must exercise good faith in effecting a composition agreement. For example, the debtor cannot pretend to be insolvent, in order to induce the creditors to accept a small portion of their debts in lieu of the full amount, when in fact the debtor has sufficient property to pay the creditors in full. This good faith requires that the debtor, before being permitted to profit by the composition agreement must make a full and fair disclosure of assets to the creditors and must refrain from practicing concealment, deception, or fraud on them [*Boas v. Bank of America* (1942) 51 Cal. App. 2d 592, 597, 125 P.2d 620 , *disapproved on other grounds*, *Gagne v. Bertran* (1954) 43 Cal. 2d 481, 488 n.5, 275 P.2d 15] .

Creditors also must act in good faith. Composition agreements rest on the express or implied understanding that all of the creditors are to share proportionally in the debtor's assets [*O'Brien v. Greenebaum* (1891) 92 Cal. 104, 107, 28 P. 214 ; *Muth v. Educators Security Ins. Co.* (1981) 114 Cal. App. 3d 749, 758, 170 Cal. Rptr. 849] . Therefore, if some of the creditors have secretly obtained more favorable terms than are disclosed by the agreement, the agreement is fraudulent and void as to the creditors who did not receive those secret preferences [*O'Brien v. Greenebaum* (1891) 92 Cal. 104, 107, 28 P. 214] . Similarly, when a person other than the debtor (for example, a friend or relative of the debtor) makes a preferential payment, from a source other than the debtor's assets, to fewer than all of the creditors, with intent to induce those preferred creditors to enter into the composition agreement, the principles of equity and the mutual confidence among creditors on which the agreement is based are violated, and the agreement is invalid [see *Kullman v. Greenebaum* (1891) 92 Cal. 403, 404-406, 28 P. 674] .

[e] Effectiveness of Agreement in Ensuing Bankruptcy Reorganization

A Chapter 11 reorganization plan containing the same provisions as a nonbankruptcy agreement entered into between the debtor and creditors prior to the bankruptcy proceeding may or may not be binding on the creditors in the subsequent Chapter 11 reorganization. For a discussion of the relevant considerations, see § 78.12[5]. For a checklist of mandatory and permissive provisions of a Chapter 11 reorganization plan, see § 78.137.

[2] FORM

Composition Agreement--Debt Partially Paid in Installments

AGREEMENT

This agreement is made _____[date] by _____[name and status of debtor] ("the Debtor") and various creditors of the Debtor, whose names and signatures (personally or by their authorized agents or representatives) appear at the end of this document ("the Creditors").

RECITALS

A. The Debtor is indebted to the Creditors in the amounts set opposite their names on Exhibit A, which is attached to this agreement.

B. The Debtor is unable to pay these debts in full and has offered to compromise the debts on the terms set forth in this agreement.

THE PARTIES THEREFORE AGREE AS FOLLOWS:

1. Compromise Payment of Claims. The Debtor shall pay to the Creditors _____ percent of present claims set forth in Exhibit A. Payment will be made in four successive equal quarterly installments, with the first payment to be made _____[date] and the last payment to be made _____[date].

2. Acceptance of Compromise. The Creditors shall accept from the Debtor the payment of _____ percent of their present claims in accordance with Paragraph 1. For as long as the Debtor pays the compromised amount in accordance with Paragraph 1, no Creditor shall take legal or other action against the Debtor or the Debtor's property in connection with the present claim of the Creditor against the Debtor.

3. Release of Debtor. On receipt by the Creditors of the fourth installment described in Paragraph 1 on or before the last date specified in that paragraph, the Debtor shall be completely released and discharged from all present claims of the Creditors against the Debtor, and each Creditor shall surrender to the Debtor all notes and other evidences of indebtedness now held in connection with the present claims.

4. Default by Debtor. If the Debtor defaults in making the payments to any Creditor as required under Paragraph 1, the full amount of the present claims of the Creditors (less any payments received under this agreement) shall immediately become due and payable, and the Creditors shall have the right to pursue any remedy then available as if this agreement had never been made.

5. Effectiveness of Agreement. This agreement shall become effective only on its acceptance by [number, e.g., 90] percent of the Creditors, both in number and in amount of claims. Acceptance by the Creditors is to be evidenced by their signatures on this agreement on or before _____ [date]. If this agreement is not so accepted, it shall be ineffective as to all Creditors.

6. Amounts Due. The amounts set opposite the respective names of the Creditors on Exhibit A are the full amounts of the debts due to each Creditor from the Debtor.

7. Binding Effect. This agreement, when effective, shall be binding on the parties and their respective legal representatives, successors, and assigns.

8. Entire Agreement. This agreement supersedes all agreements previously made between the parties relating to its subject matter. There are no other understandings or agreements between them.

9. Notices. All notices or other documents under this agreement shall be in writing and delivered personally or mailed by first class mail, postage prepaid, to the parties at their last known addresses.

10. Nonwaiver. No delay or failure by a party to exercise any right under this agreement, and no partial or single exercise of that right, shall constitute a waiver of that or any other right, unless this agreement provides otherwise.

11. Headings. Headings in this agreement are for convenience only and shall not be used to interpret or construe its provisions.

12. Governing Law. This agreement shall be construed in accordance with the laws of the state of California.

13. Counterparts. This agreement may be executed in two or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument.

14. Power and Authority to Execute Agreement. Each party has power to execute this agreement. Each party warrants that the individual signing this document as or for that party is duly and fully empowered and authorized to sign for the purpose of executing this agreement and binding that party to the terms of this agreement.

Executed _____ [date].

DEBTOR

_____ [signature]

[typed name]

CREDITORS

[Add signature blocks for each creditor:]

_____ [signature]

[typed name]

[Continue with the following:]

Exhibit A
Schedule of Creditors' Claims

Name and Address of Creditor	Total Amount of Claim	Description
_____	\$ _____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	\$ _____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	\$ _____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	\$ _____	_____
_____	_____	_____
_____	_____	_____

_____	\$ _____	_____
_____	_____	_____

_____	\$ _____	_____
_____	_____	_____

_____	\$ _____	_____
_____	_____	_____

	TOT \$ _____	
	AL _____	

Legal Topics:

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

Contracts LawDebtor & Creditor RelationsContracts LawPerformanceGeneral OverviewContracts
LawPerformancePartial PerformanceGeneral Overview



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27-78 California Legal Forms--Transaction Guide § 78.206

AUTHOR: John A. Vos, Practice Consultant

§ 78.206 Composition Agreement Following Assignment for Benefit of Creditors and Using Trustee

[1] Comment

[a] Use of Form

The form in [2], *below*, is a composition agreement that provides for participating creditors to accept a percentage of their claims, to be paid by the debtor on a continuing monthly basis from net proceeds of the debtor's business. It assumes that the debtor has previously made an assignment for the benefit of creditors [see § 78.230 et seq.], but the creditors have determined, after the execution of the assignment, that a sale of the debtor's assets would yield an insignificant amount, and the creditors would more likely recover a greater amount of the debts owed by permitting the debtor to continue in business and to pay the creditors a reduced, specified sum. (For discussion of the tax consequences, see § 78.14.)

A trustee and the assignee under the assignment for benefit of creditors are also parties to this agreement. The assignee is required to reassign and release the debtor's property to the debtor, but the debtor is required to simultaneously transfer the property in trust to a trustee. The debtor is allowed the use of the property in conducting business, subject to certain controls of the trustee, and for as long as the debtor does not default in payments under the agreement.

[b] Liquidation of Assets

The agreement permits the trustee to take possession of and liquidate the debtor's property if the debtor defaults in monthly payments. In that case, the debtor must pay the creditors their full claims, rather than the smaller compromised amount. The agreement also permits the creditors to make the determination that the business should be liquidated and to order the trustee to take possession of and liquidate the debtor's assets. Provided the debtor is not then in default under the agreement, the creditors would be entitled only to receive the unpaid balances due to them as reduced by the agreement.

[2] FORM**Composition Agreement Following Assignment for Benefit of Creditors and Using Trustee****AGREEMENT**

This agreement is entered into _____[*date*] by _____[*name of debtor*] ("the Debtor"), an individual doing business as _____[*name of business*], and _____[*name of trustee*] ("the Trustee"), and various creditors of the Debtor, whose names and signatures (personally or by their authorized agents or representatives) appear at the end of this document ("the Creditors"), and [name of assignee] ("the Assignee").

RECITALS

A. The Debtor is unable to pay debts owing to the Creditors and made an assignment to the Assignee of all of the Debtor's property for the benefit of the Creditors by written instrument dated _____.

B. The Creditors, at a meeting held _____[*date*], unanimously decided that the sale of the Debtor's assets would yield an insufficient sum to satisfy their claims and that the continuation of the Debtor's business (the "Business") would permit the Creditors to recover a greater amount of the debts owed by the Debtor.

C. The Creditors unanimously agreed at the meeting to accept the Debtor's offer to pay the Creditors a compromised amount in full discharge of their claims against the Debtor, provided this compromise agreement is executed and secured by the assignment of assets to the Trustee.

THE PARTIES THEREFORE AGREE AS FOLLOWS:

1. Compromise Payment of Claims. The Debtor shall pay to each Creditor, and each Creditor shall accept, in full satisfaction and discharge of the Creditor's total claim, _____ percent of the total claim, as that claim is set forth in Exhibit A attached to this agreement. In consideration of the compromise payment to them, the Creditors shall release the Debtor from the debts due to them respectively and shall refrain from initiating or pursuing any action, proceeding, or demand relating to those debts.

2. Payment to Trustee. Until the compromise amount described in Paragraph 1 has been paid in full, the Debtor, within [*number*] days after the end of each month, shall pay to the Trustee for the benefit of the Creditors, the net cash proceeds of the Business for that month, deducting only normal operating expenses. "Normal operating expenses" include a monthly compensation to the Debtor for services, not exceeding \$_____, but the total amount of normal operating expenses for the Business in any one month shall not exceed \$_____. Immediately on receipt of the net cash proceeds, the Trustee shall distribute the proceeds among the Creditors proportionally, without preference or priority.

3. Resignation of Assignee. The Assignee hereby resigns as assignee for the benefit of the Creditors under the written assignment dated _____[*date*] and releases to the Debtor all property for which the Assignee is accountable. The Assignee shall make a full written accounting to the Debtor and to the Trustee. On receipt of the accounting, and provided the Debtor and the Trustee are satisfied as to the correctness of it, the Assignee shall be released from all obligations under the assignment, and the Assignee's bond shall be canceled. The Creditors hereby appoint the Trustee as their attorney in fact to appear for them in all proceedings relating to the resignation and discharge of the Assignee, and to execute a release to the Assignee.

4. Assignment to Trustee. The Debtor assigns to the Trustee in trust all of the Debtor's property, except any property that is by law exempt from a money judgment, execution, or other legal process. This assignment is subject to two conditions:

(1) The Debtor shall be allowed to use, employ, and dispose of all the property in the normal conduct of the Business, subject to the control and supervision of the Trustee, unless the Debtor defaults in the payment to the Trustee of any monthly installment of the net cash proceeds of the Business as required in Paragraph 2.

(2) If the Debtor pays to the Trustee the full compromise amount required under Paragraphs 1 and 2 of this agreement, the assignment is void.

The Debtor will not use any proceeds of the Business for the acquisition of any inventory or other property without the Trustee's prior written consent. The Trustee may not give that consent unless it is conditioned on the immediate assignment by the Debtor to the Trustee of any inventory or other property so acquired, to be held by the Trustee under the terms of this agreement.

5. Accounting to Trustee. The Debtor will keep a detailed account of all sales made in the Business (including all cash received and accounts and notes contracted or received) and of all expenses incurred in the Business. These accounts shall be delivered to the Trustee at the end of every month until the Debtor has paid the compromise amount in full. The Debtor shall make available to the Trustee the books of account and other records of the Business during all reasonable business hours.

6. Default by Debtor. If the Debtor defaults in the payment to the Trustee of any monthly installment of the net cash proceeds of the Business under Paragraph 2, or the Debtor otherwise defaults under the terms of this agreement, the Trustee shall immediately take possession of, collect, hold, manage, sell, or otherwise dispose of all property assigned to the Trustee pursuant to Paragraph 4. The Trustee shall further have the right to do any and all of the following: bring and prosecute any action necessary to realize on the Debtor's assets; settle all suits affecting the Debtor's assets; execute and deliver all assignments, deeds, or other instruments necessary to carry out the purposes of this agreement; pay all expenses in connection with the operation of the Business; apply the net proceeds toward the immediate payment to the Creditors of the full unpaid balances due to them, without preference or priority, and without regard to the reduction of their claims by this agreement; and pay any surplus of those proceeds to the Debtor.

7. Dissolution of Business. At any time during the term of this agreement, Creditors representing at least _____ percent in amount of the present claims against the Debtor may decide at a Creditors' meeting called for that purpose, or in writing, that it would be in the best interest of the Creditors to dissolve and wind up the Business. In that event, the Trustee shall immediately take possession of the Business and liquidate its assets pursuant to the powers and duties of the Trustee set forth in Paragraph 6. If the Debtor is not in default under this agreement at the time the Creditors elect the foregoing course of action, the Creditors are entitled to receive only an amount not exceeding the unpaid balances due to them as reduced by this agreement. All Creditors shall be given at least 10 days prior written notice of a Creditors' meeting at which the dissolution of the Business will be voted on. That notice shall set forth the nature of the business to be transacted at the meeting.

8. Marshaling of Assets. If any Creditor holds security for any part of the Creditor's claim and is required to realize on the security before proceeding against the Debtor's general assets in equity, then that Creditor is entitled to receive installments of compromise payments from the Trustee as if the Creditor's full claim amounted only to the excess of the Creditor's entire debt over the value of the security, as that value is determined by the Trustee, unless the Creditor surrenders the security to the Trustee for the benefit of all Creditors.

9. Other Security. Except as otherwise provided in Paragraph 8, this agreement in no way affects the rights of any

Creditor with respect to any security that the Creditor may hold for a claim or with respect to the rights of any Creditor against any guarantor or any person other than the Debtor.

10. Fee of Trustee. For services performed by the Trustee under this agreement, the Trustee is entitled to receive \$_____ payable out of the amounts received from the Debtor, before any money is distributed to the Creditors. If the Trustee is required to act under either Paragraph 6 or 7, the Trustee shall receive additional reasonable compensation in an amount determined by a majority (in number and amount) of the Creditors.

11. Power of Attorney. The Creditors appoint the Trustee their attorney-in-fact to carry out the terms of the trust created by this agreement and to execute all instruments and do other acts necessary to fully carry out the intention of this agreement.

12. Termination of Agreement. This agreement shall terminate when the Creditors have received _____ percent of their respective claims, after payment of the Trustee's fee as provided in Paragraph 10. The Debtor then shall be completely released from all liability on account of any claim covered by this agreement. Notwithstanding anything in this agreement to the contrary, in case any petition in bankruptcy or any other insolvency proceeding is instituted by or against the Debtor, or in case attachment or execution is levied on any of the Debtor's property, or application is made for the appointment of a receiver for the Debtor's property by anyone not a party to this agreement, then this agreement shall automatically terminate, and the full amounts of the claims covered by this agreement, less payments received under this agreement or otherwise, shall immediately become due and payable, and each Creditor shall have the right to pursue any remedy available to him or her.

13. Amounts Due. The amounts set opposite the respective names of the Creditors on Exhibit A to this agreement are the full amounts of the debts due to each Creditor from the Debtor.

14. Binding Effect. This agreement, when effective, shall be binding on the parties and their respective legal representatives, successors, and assigns.

15. Entire Agreement. This agreement supersedes all agreements previously made between the parties relating to its subject matter. There are no other understandings or agreements between them.

16. Notices. All notices or other documents under this agreement shall be in writing and delivered personally or mailed by first class mail, postage prepaid, to the parties at their last known addresses.

17. Nonwaiver. No delay or failure by a party to exercise any right under this agreement, and no partial or single exercise of that right, shall constitute a waiver of that or any other right, unless this agreement provides otherwise.

18. Headings. Headings in this agreement are for convenience only and shall not be used to interpret or construe its provisions.

19. Governing Law. This agreement shall be construed in accordance with the laws of the state of California.

20. Counterparts. This agreement may be executed in two or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument.

21. Power and Authority to Execute Agreement. Each party has power to execute this agreement. Each party warrants that the individual signing this document as or for that party is duly and fully empowered and authorized to sign for the purpose of executing this agreement and binding that party to the terms of this agreement.

Executed _____[date].

DEBTOR

_____ [signature]

[typed name]

ASSIGNEE

_____ [signature]

[typed name]

TRUSTEE

_____ [signature]

[typed name]

CREDITORS

[Add signature blocks for each creditor as follows:]

_____ [signature]

[typed name]

[Continue with the following:]

Exhibit A
Schedule of Creditors' Claims

Name and Address of Creditor	Total Amount of Claim	Description
_____	\$_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	\$_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	\$_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____

Contracts LawDebtor & Creditor RelationsContracts LawPerformanceAssignmentGeneral OverviewContracts LawTypes of ContractsGeneral Overview



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DIVISION V: CONTRACTS AND OBLIGATIONS
CHAPTER 78 CREDITORS' AGREEMENTS: NONBANKRUPTCY ALTERNATIVES
PART IV. FORMS
A. Complete Creditors' Agreements

27-78 California Legal Forms--Transaction Guide §§ 78.207-78.219

AUTHOR: John A. Vos, Practice Consultant

[Reserved]

§§ 78.207[Reserved]



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B. Separate Provisions for Creditors' Agreements

27-78 California Legal Forms--Transaction Guide § 78.220

AUTHOR: John A. Vos, Practice Consultant

§ 78.220 Creditors to Elect Payment of Reduced Debt in Cash or of Full Debt in Installments

[1] Comment--Use of Form

The form in [2], below, provides, at the creditors' option, for immediate payment in cash of a reduced amount of the total claim, or payment of the total amount of the claim over an extended period. It also provides for the immediate payment in full of small claims under a stated maximum amount. This provision may be inserted into an extension or composition agreement between a debtor and the creditors.

For complete forms for extension agreements, see §§ 78.200-78.204. Illustrative composition agreements are set forth in §§ 78.205 and 78.206. For further discussion of creditors' agreements, see § 78.12.

[2] FORM

Creditors to Elect Payment of Reduced Debt in Cash or of Full Debt in Installments

_____. **Payment of Claims.** The Debtor's payment of the Creditors' claims shall comply with the following provisions.

(a) On the date each Creditor with a claim of \$[*maximum amount*] or less (the Threshold Amount) executes this agreement, the Debtor shall pay the Creditor's claim in cash and in full.

(b) The Debtor shall fully pay, satisfy, and discharge the total claim of any Creditor in excess of the Threshold Amount in installments, by either of the following methods elected by each Creditor:

(1) The Debtor shall pay in cash the Threshold Amount or _____ percent of the total claim, whichever is greater, on the date Creditor executes this agreement; or

(2) The Debtor shall pay _____ percent of the total claim in cash on the date the

Creditor executes this agreement, and the balance of the total claim in installments as follows:

_____ [*describe payment plan, e.g., a payment of \$_____ on each anniversary of the foregoing initial cash payment until the total claim is paid in full*].

(c) Each Creditor to be paid, when executing this agreement, shall state in writing an election of the method for payment. For any Creditor electing the installment method of payment described in clause (b)(2), the Debtor shall execute and deliver a promissory note to the Creditor evidencing the installment portion of the claim. The promissory note shall be in the form attached to this agreement as Exhibit _____.

(d) The Debtor may prepay any claim without penalty. The Creditors agree to waive any and all interest that could accrue on their claims on or after the date of this agreement.

Legal Topics:

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

Contracts LawDebtor & Creditor RelationsContracts LawNegotiable InstrumentsDischarge & PaymentPaymentMethods & PlacesContracts LawNegotiable InstrumentsDischarge & PaymentPaymentTime for Payment



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B. Separate Provisions for Creditors' Agreements

27-78 California Legal Forms--Transaction Guide § 78.221

AUTHOR: John A. Vos, Practice Consultant

§ 78.221 Restrictions on Debtor's Business Operations

[1] Comment--Use of Form

The form in [2], below, is a provision that may be used in an extension agreement to restrict the debtor's activities during the term of the agreement. Creditors entering into an extension agreement need to ensure that their position under the agreement is not jeopardized by acts of the debtor that may worsen the debtor's financial situation or result in claims or liens superior to those of the creditors executing the agreement. The list of prohibited or restricted acts set forth in the form is illustrative only, and should be modified to suit the particular circumstances of the debtor and the creditors.

For a provision that sets forth affirmative obligations of a debtor during the term of an extension agreement, see § 78.222. Complete forms for extension agreements are set forth as §§ 78.200-78.204.

[2] FORM

Restrictions on Debtor's Business Operations

_____. **Restrictions on Debtor's Business Operations.** Until the Debtor has fully paid and satisfied the claims of the Creditors covered by this agreement, the Debtor shall not do any of the following without the prior written consent of the Creditors:

- (a) Sell, assign, lease, transfer, or otherwise dispose of any property, other than in the ordinary course of business.
- (b) Make any loan in any amount to any person or entity.
- (c) Make any expenditure for fixed or capital assets if the expenditure would cause the total of all expenditures for fixed or capital assets in a fiscal year to exceed \$_____.

(d) Assume or guarantee or otherwise become directly or contingently liable on the indebtedness of any other person or entity.

(e) Create, incur, or otherwise permit to occur, any lien, deed of trust, pledge, security interest, or other encumbrance on any property or assets of the Debtor, whether presently owned or acquired in the future.

(f) Assign or otherwise convey any right to receive income.

(g) Pay any debt except those specifically authorized for payment under this agreement.

[*Optional:*]

(h) Declare or pay any dividends, purchase, redeem, retire, or otherwise acquire for value any of its outstanding capital stock (whether outstanding now or in the future), return any capital to its shareholders, or make any distribution of its assets to its shareholders, unless this agreement provides otherwise.

[*Optional:*]

(i) Liquidate, merge into or consolidate with or into any entity, or sell, assign, lease, transfer, or otherwise dispose of substantially all of its assets to any person.

Legal Topics:

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

Business & Corporate LawCorporationsGeneral OverviewContracts LawContract Conditions & ProvisionsGeneral OverviewContracts LawDebtor & Creditor Relations



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B. Separate Provisions for Creditors' Agreements

27-78 California Legal Forms--Transaction Guide § 78.222

AUTHOR: John A. Vos, Practice Consultant

§ 78.222 Affirmative Obligations of Debtor During Term of Agreement

[1] Comment--Use of Form

The form in [2], below, is a provision that sets forth specific affirmative obligations of the debtor during the term of an extension agreement. When unsecured creditors agree to extend the debtor's payment period, they often demand that the debtor perform specified actions during the term of the agreement (for example, make timely payment of wages and taxes) to prevent the filing of claims that would have priority over those of the unsecured creditors. The creditors also generally require submission of regular financial statements by the debtor in order to continually monitor the debtor's financial condition.

The provision may be used in conjunction with or in lieu of the provisions for affirmative obligations in §§ 78.200-78.204 (complete extension agreements). For a provision that restricts the actions of a debtor during the term of an extension agreement, see § 78.221.

[2] FORM

Affirmative Obligations of Debtor During Term of Agreement

_____. **Affirmative Obligations of Debtor During Term of Agreement.** Until the Debtor has fully paid and satisfied the claims of the Creditors covered by this agreement, the Debtor shall do all of the following:

- (a) Promptly notify the Creditors of any lawsuit, governmental action, or other proceeding initiated against the Debtor or the Debtor's property.
- (b) Maintain the insurance policies currently insuring the Debtor's business, as those policies are described in Exhibit _____ attached to this agreement.

- (c) Promptly pay all wages, and other compensation required by written contract, to the Debtor's employees.
- (d) Pay, before the attachment of any penalty, all taxes and assessments or other governmental charges on the Debtor's income, profits, or property.
- (e) Conduct business operations in compliance with all applicable laws, rules, regulations, and ordinances of any governmental authority.
- (f) Permit the Creditors or their representatives to inspect financial books and records at the Debtor's place of business during normal business hours.
- (g) Within [number] days after each of the first three quarters of the fiscal year, furnish to the Creditors a current balance sheet and a current statement of income and earnings and source of application of funds, certified by _____[*name of chief financial officer or independent accounting firm*] as having been prepared in accordance with generally accepted accounting principles consistently applied, and fairly and accurately representing the financial position, results of operations, and changes in financial position of the Debtor as of and for the periods designated in those documents.
- (h) Within [number] days after the end of the fiscal year, furnish to the Creditors the same items described in clause (g), above, for the fiscal year.

Legal Topics:

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

Contracts LawContract Conditions & ProvisionsGeneral OverviewContracts LawDebtor & Creditor Relations



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B. Separate Provisions for Creditors' Agreements

27-78 California Legal Forms--Transaction Guide § 78.223

AUTHOR: John A. Vos, Practice Consultant

§ 78.223 Acceptance by Creditors of Subsequent Chapter 11 Reorganization Plan

[1] Comment--Use of Form

The form in [2], below, is a provision that may be included in an extension or composition agreement if the creditors executing the agreement will accept and be bound by a subsequent Chapter 11 reorganization plan, should one ensue, containing the same terms for payment to them as the extension or composition agreement. (For a checklist of general provisions that must or may be included in a Chapter 11 reorganization plan, see § 78.137.) The inclusion of this type of provision in an agreement will not bind the creditors to an ensuing reorganization plan, however, unless they have received required disclosures regarding the plan [see 11 U.S.C. § 1126(a); see also § 78.12[5]].

For complete forms for extension agreements, see §§ 78.200-78.204. Illustrative composition agreements are set forth in §§ 78.205 and 78.206.

[2] FORM

Acceptance by Creditors of Subsequent Chapter 11 Reorganization Plan

_____. **Acceptance by Creditors of Subsequent Chapter 11 Reorganization Plan.** Each of the Creditors acknowledges receiving the Debtor's financial statements and other information requested by the Creditors and provided by the Debtor. Each of the Creditors considered that information adequate to make the decision to enter into this agreement. Each of the Creditors agrees that if a petition under Chapter 11 of the Bankruptcy Code is filed by or against the Debtor and a plan containing the same terms for payment to the Creditors is proposed, the Creditor's execution of this agreement shall also constitute an acceptance of the proposed plan in the bankruptcy case.

Legal Topics:

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

Bankruptcy LawReorganizationsPlansGeneral OverviewContracts LawDebtor & Creditor Relations



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B. Separate Provisions for Creditors' Agreements

27-78 California Legal Forms--Transaction Guide §§ 78.224-78.229

AUTHOR: John A. Vos, Practice Consultant

[Reserved]

§§ 78.224[Reserved]



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PART IV. FORMS
C. Assignments for Benefit of Creditors

27-78 California Legal Forms--Transaction Guide § 78.230

AUTHOR: John A. Vos, Practice Consultant

§ 78.230 General Assignment by Proprietor for Benefit of Creditors

[1] Comment

[a] Use of Form

The form in [2], *below*, is an assignment for the benefit of creditors by a debtor who is a sole proprietor. It requires the debtor to assign all nonexempt property. Proceeds from the sale of the property are to be used to pay in full the claims of creditors. If the proceeds are insufficient for this purpose, the assignee is to make proportional payments to creditors who agree to accept them as payment in full of their claims [*see [b], below*].

For an assignment for use when the debtor is a partnership, see § 78.231. For a general assignment by a corporation for the benefit of creditors, see § 78.232. For a discussion of general matters pertinent to these assignments, see § 78.13. For a checklist of matters to consider in connection with making an assignment for the benefit of creditors, see § 78.123.

[b] Discharge of Debtor

Ordinarily an assignment for the benefit of creditors and the payment of dividends under the assignment do not result in a discharge of the debtor, except to the extent that the claims of the creditors are reduced by actual payment. However, if the assignment provides that the debtor will be released from further liability, that release is binding on creditors who accept the benefits of the assignment [*Boteler v. Robinson (1930) 105 Cal. App. 611, 615, 288 P. 135* ; *Equitable Life Assur. Soc. v. Jacobson (1924) 68 Cal. App. 717, 722, 230 P. 200*] . For the effect of this type of release on a creditor with a security interest, see § 78.13[7].

[c] Assignments Under Attachment Law

Under the Attachment Law [*CCP § 481.010 et seq.*], a general assignment for the benefit of creditors terminates the lien

of a temporary protective order or of attachment if the lien was created within 90 days before the making of the general assignment [CCP § 493.030(a)]. For these purposes, a general assignment for the benefit of creditors is an assignment that possesses all of the following characteristics [CCP § 493.010]:

- Assigns all of the defendant's (debtor's) assets that are transferable and not exempt from enforcement of a money judgment [see *[e]*, below];
- Is for the benefit of all of the defendant's creditors; and
- Does not in itself create a preference of one creditor or class of creditors over any other creditor or class of creditors [but see CCP § 493.010(c) (assignment may recognize preferences to which creditors are otherwise entitled)].

When the making of the assignment terminates a lien, the assignee is subrogated to the rights of the plaintiff under the temporary protective order or attachment [CCP § 493.060(a)].

The requirements of the Attachment Law governing general assignments for the benefit of creditors are designed to limit the application of the law for the termination of the lien of a temporary protective order or of attachment on the making of a general assignment. This limitation reflects the policy that an attaching plaintiff should not lose the attachment preference as against an assignment for the benefit of creditors unless the assignment is designed to distribute all of the defendant's transferable nonexempt assets proportionally among all creditors. The requirement that the assets must be transferable recognizes that some property, such as a lease that is subject to a condition that it may not be transferred without the lessor's consent, may not be assignable. This nontransferable property need not be included in a general assignment for the benefit of creditors under the Attachment Law [see 14 Cal. Law. Rev. Comm. Reports 61 (1977 Addition)].

On termination of the lien because of the making of a general assignment for the benefit of creditors, the assignee may obtain the release of the attached property by filing with the levying officer a request for release of attachment and other documents prescribed by statute [see CCP § 493.040]. A lien of a temporary protective order or of attachment that has terminated pursuant to statute is reinstated with the same effect as if it had not been terminated when the general assignment for the benefit of creditors is set aside otherwise than by the filing of a petition commencing a bankruptcy case [CCP § 493.050(a)(1)].

[d] Recovery of Preferential Transfers

The assignee under an assignment for the benefit of creditors may recover certain transfers of property by a debtor, generally called preferences, within one year after making the assignment [see CCP § 1800(g)]. Unless specifically excepted by statute, the assignee of any general assignment for the benefit of creditors [see CCP § 493.010 (definition); see also *[c]*, above] may recover any transfer of property meeting the following criteria [CCP § 1800(b); see CCP § 1800(a) (applicable definitions)]:

- Made to or for the benefit of a creditor;
- Made for or on account of an antecedent debt owed by the debtor before the transfer was made;
- Made while the debtor was insolvent;
- Made on or within 90 days before the date of the making of the assignment or made between 90 days and one year before the date of the making of the assignment if the creditor, at the time of the transfer, was an insider and had reasonable cause to believe that the debtor was insolvent at the time of the

transfer; and

- Enabling the creditor to receive more than another creditor of the same class.

For these purposes, the debtor is presumed to have been insolvent during the 90 days immediately preceding the date of making the assignment [CCP § 1800(f)].

CCP § 1800(b) should be interpreted in accordance with decisions applying the analogous provision of the Bankruptcy Code, 11 U.S.C. § 547, which generally do not require a showing of benefit to the bankruptcy estate in order to avoid a preferential security interest. CCP § 1800, like 11 U.S.C. § 547, contains no language limiting the remedy it provides to situations in which the estate will benefit [*Blonder v. Cumberland Engineering* (1999) 71 Cal. App. 4th 1057, 1061-1064, 84 Cal. Rptr. 2d 216 (assignee for benefit of creditors had standing under CCP § 1800 to recover creditor's security interests in equipment as preferential transfers, even though underlying assets had been sold and bankruptcy estate and unsecured creditors would not benefit)].

CCP § 1800 is not preempted by the Bankruptcy Code [Haberbush v. Charles & Dorothy Cummins Family Limited Partnership (2006) 139 Cal. App. 4th 1630, 1640, 43 Cal. Rptr. 3d 814; *contra*, Sherwood Partners, Inc. v. Lycos, Inc. (9th Cir. 2005) 394 F.3d 1198, 1202-1206]. An assignee may not recover any of various transfers specified by statute [see CCP § 1800(c)].

For further discussion of the recovery of preferences, see California Forms of Pleading and Practice, Ch. 307, *Insolvency* (Matthew Bender).

[e] Property Exempt From General assignment

In a general assignment for the benefit of creditors that meets the requirements of CCP § 493.010 [see [c], above], an individual debtor may retain, as exempt, any property that is otherwise exempt from the enforcement of money judgments [see CCP § 703.010 *et seq.*; see also *California Forms of Pleading and Practice*, Ch. 254, *Executions and Enforcement of Judgments*, § 254.10 *et seq.* (Matthew Bender)] or listed in CCP § 1801 [CCP § 1801], which lists essentially the same property as is exempt in federal bankruptcy proceedings [see 11 U.S.C. § 522]. For coverage of the detailed provisions of CCP § 1801, see California Forms of Pleading and Practice, Ch. 307, *Insolvency* (Matthew Bender).

[f] Fraudulent Transfers by Debtor

The assignee of a general assignment for the benefit of creditors, as defined in CCP § 493.010 [see [c], above], may pursue statutory remedies for the recovery of property transferred in violation of the Uniform Fraudulent Transfer Act [CC § 3439 *et seq.*] or personal property transferred by the debtor without immediate delivery and change in possession [see CC § 3440 *et seq.*], if the remedies are available to any of the creditors that are beneficiaries of the assignment [CC §§ 3439.07(d), 3440]. The Uniform Fraudulent Transfer Act is designed to prevent debtors from placing property beyond the reach of their creditors when the property should be made available to satisfy the creditors' demands [see *Chichester v. Mason* (1941) 43 Cal. App. 2d 577, 584, 111 P.2d 362 (decided under former CC §§ 3439, 3442)]. The remedies pertaining to transfers of personal property without delivery or change of possession are intended to prevent the deception of creditors arising out of the ostensible ownership of property by a transferor who has made a secret transfer of the property [see *Dersch v. Thomas* (1934) 138 Cal. App. Supp. 785, 789, 30 P. 2d 630]. The assignee can exercise these rights and remedies only to the extent that they are available, and only for the benefit of those creditors whose rights are asserted by the assignee [CC §§ 3439.07(d), 3440(b)]. For detailed coverage of these remedies, see California Forms of Pleading and Practice, Ch. 270, *Fraudulent Conveyances* (Matthew Bender).

[g] Priority of Claims

Debts due to the United States by any person who is insolvent must be satisfied first. This priority extends to cases in which a debtor, not having sufficient property to pay all debts, makes a voluntary assignment of property. The assignee is included within the fiduciaries held personally liable for failing to observe the priority of debts to the United States [see 31 U.S.C. § 3713]. However, the Supreme Court held that the federal tax lien act, rather than 31 U.S.C. § 3713, was the controlling statute when the federal government sought, pursuant to 31 U.S.C. § 3713, to assert priority of a federal tax lien over a judgment lien that had been perfected under state law. Under *I.R.C. § 6323(a)*, the unrecorded federal tax lien did not have priority over the judgment lien [*United States v. Estate of Romani* (1998) 523 U.S. 517, 118 S. Ct. 1478, 140 L. Ed. 2d 710] .

California law provides that when any assignment, whether voluntary or involuntary, and whether formal or informal, is made for the benefit of creditors of the debtor, or results from any proceeding in insolvency or receivership commenced against the debtor, or when any property is turned over to the creditors of a person, firm, association, or corporation, or to a receiver or trustee for the benefit of creditors, priority must be given to allowed unsecured claims to the extent of \$4,300 earned by each individual or corporation within 90 days before the earlier of the date the assignment was made, the property was taken over, the court proceedings were begun, or the debtor's business ceases, for either wages, salaries and commissions, including vacation, severance, and sick leave pay earned by an individual, or sales commissions earned by an individual, or by a corporation with only one employee, acting as an independent contractor in the sale of goods and services in the ordinary course of the debtor's business, if in the 12 months preceding the events described above, at least 75 percent of the individual's or corporation's earnings as an independent contractor in the sale of goods or services was earned from the debtor [CCP § 1204(a)].

Next in priority are allowed unsecured claims for contributions to employee benefit plans arising from services rendered within 180 days before the earlier of any event described in the preceding paragraph, in an amount not exceeding that determined by a statutory formula [see CCP § 1204(b)].

If there is insufficient money with which to pay all of these labor claims in full, the available money must be distributed proportionally [see CCP § 1204(c)].

In any assignment for the benefit of creditors, special priority rules govern allowed unsecured claims of individuals (for up to \$900 per individual) that arise from the deposit of money in connection with the purchase, lease, or rental of property, or the purchase of services, when the property or services were for the personal, family, or household use of those individuals and were not delivered or provided. These allowed unsecured claims are subordinate to the claims covered by CCP § 1204 and to state personal and corporate income taxes [see R&T Code § 19523], but they have priority over all other unsecured claims [CCP § 1204.5]. Other priorities provided for under state law include those relating to unemployment and disability insurance [see UI Code § 1701] and sales and use taxes [see R&T Code § 6756].

[h] Power of Attorney

In the form in [2], below, the debtor appoints the assignee as attorney in fact for all matters relating to the trust created by the assignment. Other than a power of attorney that authorizes the attorney in fact to execute a mortgage [see CC § 2933], powers of attorney relating to real property need not be recorded [see *Adams v. Hopkins* (1904) 144 Cal. 19, 77 P. 712] . However, if they are recorded, they impart constructive notice [see CC §§ 1213-1216; Gov. Code § 27322]. As a practical matter, title companies generally require that a power of attorney relating to real estate be recorded. For a discussion of the requirements governing powers of attorney in general, see Ch. 98, *Powers of Attorney* .

[i] Assignment of Real Property as Conveyance

An assignment of real property for the benefit of creditors, if purporting to pass all interest of the debtor, is a

conveyance [see CC § 1215] subject to the Civil Code provisions governing transfers of real property [*Moore v. Schneider* (1925) 196 Cal. 380, 389-392, 238 P. 81 ; see CC § 1039 et seq. (transfer); see also Ch. 27, *Deeds and Recording*]. However, failure to record such a transfer does not render the conveyance invalid against a subsequently attaching creditor, since an unrecorded deed or assignment is sufficient to pass title against the creditor [*Bumb v. Bennett* (1958) 51 Cal. 2d 294, 299-300, 333 P.2d 23] .

[j] Recordation of Assignment

In order to impart constructive notice of certain property interests being transferred under an assignment, the assignment should be recorded [see CC §§ 1213-1216 (real property); CC § 2934 (deed of trust); CCP § 708.530(b) (rents); CC § 1214 (leases for term exceeding one year); *Kinnison v. Guaranty Liquidating Corp.* (1941) 18 Cal. 2d 256, 115 P.2d 450 ; *Central Constr. Co. v. Hartman* (1935) 7 Cal. App. 2d 703, 47 P.2d 484 (rights)]. (Under common law, recordation is not required in order for the assignment to be effective [see *Bumb v. Bennett* (1958) 51 Cal. 2d 294, 299, 333 P.2d 23 ; see also [i], above].)

The bulk transfers division of the Commercial Code [Com. Code § 6101 et seq.] requires the recordation of a notice of the sale, transfer, or assignment of personal property not in the ordinary course of business [see Com. Code § 6105(b)(1)]. Since the purpose of the bulk transfer requirements is to protect creditors, however, an assignment for the benefit of all creditors of the transferor and subsequent transfers by the assignee under the assignment are exempt from the requirements [see Com. Code § 6103(c)(6)].

For further discussion of recordation, see Ch. 27, *Deeds and Recording* .

[2] FORM

General Assignment by Proprietor for Benefit of Creditors

AGREEMENT AND ASSIGNMENT FOR THE BENEFIT OF CREDITORS

This agreement is made _____ [date] by _____ [name of debtor] ("the Debtor"), an individual doing business as _____ [name of business], and [name of assignee] ("the Assignee"), [legal status of assignee, e.g., a California corporation].

RECITALS

A. The Debtor has become indebted to various creditors in the course of operating the business of [describe type of business] and is unable to pay the debts in full.

B. The Debtor desires to provide for the payment of the debts by a general assignment of all of the Debtor's property to the Assignee for the benefit of all of those creditors without any preference or priority, except any priorities that are established and permitted by law.

THE PARTIES THEREFORE AGREE AS FOLLOWS:

1. Assignment. The Debtor assigns to the Assignee and the Assignee's successors and assigns, for the benefit of the Debtor's creditors, all property (except property that is exempt by law from enforcement of a money judgment or otherwise exempt from execution or levy and sale) of every kind and wherever situated now held by the Debtor (the "Property"). The Property includes fixtures used in the Debtor's business, all accounts receivable and notes owing to the Debtor, and cash in banks and on hand. [Add if debtor owns real property: Legal descriptions for all real property owned by the Debtor are set forth in Exhibit B attached to this assignment.]

2. Debtors' Assets. The Debtor shall deliver possession of the Property to the Assignee. The Assignee shall take possession of all of the Property, convert it into money with all reasonable diligence, and collect all debts and demands owing to and assigned by the Debtor.

3. Payment of Proceeds. (a) Out of the proceeds received, the Assignee shall pay and discharge all claims in the following order:

(1) Claims entitled to preference under state or federal law.

(2) Reasonable expenses, costs, and disbursements in connection with the execution and administration of this agreement, including the commission to which the Assignee is entitled for services rendered.

(3) *[Add if appropriate: A promissory note dated _____, payable to _____ (name of secured creditor), for the sum of \$_____, secured by a perfected security interest in the fixtures of the Debtor's business.*

(4) The claims of all other creditors, including those listed on Exhibit A attached to this agreement, except that if there are insufficient funds with which to pay all creditors in full, the Assignee shall pay proportionally the claims of all creditors consenting to this assignment and agreeing to accept such a proportional amount as payment in full of the creditor's claim and to release the Debtor from all claims and demands.

(b) If there are proceeds remaining after payment of all debts and liabilities of the Debtor, the Assignee shall pay the remaining proceeds to the Debtor or to the Debtor's legal representatives or assigns.

4. Powers of Assignee. In order to fully effectuate this assignment and the trust created under it, the Debtor irrevocably appoints the Assignee as attorney-in-fact, with power of substitution and revocation, and with complete authority and sole discretion to do anything necessary to carry out the terms of this assignment and the trust created under it, including the authority to demand and receive from any person all property, debts, and demands belonging and owing to the Debtor, and to give acquittances and discharges for the foregoing; to sue for, prosecute, defend, and interplead on account of all of the foregoing property, debts, and demands; to sign or endorse the name of the Debtor on any check, draft, note, or other instrument for the payment of money, and on any instrument necessary to effectuate the purposes of this trust; and to execute, acknowledge, and deliver all deeds, instruments of conveyance, receipts, and releases necessary or proper for the execution of the trust created under this assignment. The Debtor shall execute and deliver any instruments requested by the Assignee that are necessary to carry out the intent and terms of this assignment and agreement.

5. Acceptance by Assignee. The Assignee accepts the trust created by this assignment and covenants with the Debtor and the Debtor's legal representatives and assigns that the Assignee shall faithfully and promptly carry out the terms of the trust.

6. Power and Authority to Execute Agreement. Each party has power to execute this agreement. Each party warrants that the individual signing this document as or for that party is duly and fully empowered and authorized to sign for the purpose of executing this agreement and binding that party to the terms of this agreement.

Executed _____ [date].

DEBTOR

_____ [signature]

[typed name]

ASSIGNEE

_____ [signature]

[typed name]

[Add acknowledgment if appropriate; see § 78.204[2].]

[Continue with the following:]

Exhibit A
Schedule of Creditors' Claims

Name and Address of Creditor	Total Amount of Claim	Description
_____	\$ _____	_____
_____	_____	_____
_____	_____	
_____	_____	
_____	_____	
_____	_____	
_____	\$ _____	_____
_____	_____	_____
_____	_____	
_____	_____	
_____	_____	
_____	_____	
_____	\$ _____	_____
_____	_____	_____
_____	_____	
_____	_____	
_____	_____	
_____	_____	
_____	\$ _____	_____
_____	_____	_____
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	\$	_____
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_____	—	_____
	—	
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	—	
	—	
_____	\$	_____
_____	—	_____
	—	
	—	
	—	
	—	
	TOT \$	_____
	AL	_____

[Include if debtor owns real property (see Paragraph 1, above):]

Exhibit B
Descriptions Real Property Owned by Debtor

[Attach legal descriptions of each piece of real property owned by debtor.]

Legal Topics:

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

Contracts Law Debtor & Creditor Relations Contracts Law Performance Assignment General Overview



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California Legal Forms--Transaction Guide

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DIVISION V: CONTRACTS AND OBLIGATIONS
 CHAPTER 78 CREDITORS' AGREEMENTS: NONBANKRUPTCY ALTERNATIVES
 PART IV. FORMS
 C. Assignments for Benefit of Creditors

27-78 California Legal Forms--Transaction Guide § 78.231

AUTHOR: John A. Vos, Practice Consultant

§ 78.231 General Assignment by Partnership and Partners for Benefit of Creditors

[1] Comment

[a] Use of Form

The form in [2], *below*, is a general assignment by a partnership and the partners individually for the benefit of creditors. The partnership and partners assign all of the partnership property and all of their nonexempt individual property [see § 78.230[1][e]] in trust to an assignee for the purpose of selling the property and distributing the proceeds to creditors. If the proceeds are insufficient to pay all claims in full, the assignee is to make proportional payments to those creditors who agree to accept the proportional amount as payment in full [see [b], *below*].

The agreement includes special provisions, unique to a partnership, that require the application of partnership assets to partnership debts and then of individual assets of each partner to that partner's debts. An assignment of both partnership and individual property for the benefit of creditors will be construed to give the creditors of individual partners a priority in individual assets and to give partnership creditors a priority in partnership assets [see *Forbes v. Scannell* (1859) 13 Cal. 242 ; see also *O'Kane v. Hyde* (1886) 70 Cal. 6, 12 P. 124 (assignment of individual and partnership property purporting to give preference to partnership creditors over individual creditors was void as to individual property)].

If a general assignment for the benefit of creditors is used by the partnership to discontinue business [see § 78.10], *Corp. Code § 16801 et seq.* will govern the winding up of partnership business [see Ch. 15, Part B, *Dissolution of General Partnerships*].

For a discussion of the law and other considerations applicable to assignments for the benefit of creditors, see §§ 78.13 and 78.230[1]. For an assignment for use by a corporation, see § 78.232. For a checklist of matters to consider in connection with making an assignment for the benefit of creditors, see § 78.123.

[b] Ownership of Partnership Assets

This form assigns assets of both the partnership and the individual partners. In this regard, changes in basic partnership law made by the Uniform Partnership Act of 1994 (UPA '94) need to be taken in account. Since January 1, 1999, all general partnerships have been governed by UPA '94 [*Corp. Code* § 16111(b)].

UPA '94 expressly recognizes a partnership as an entity distinct from its partners, thereby mooting the old debate over whether a partnership is legally an entity or merely an aggregate of individuals [*Corp. Code* § 16201]. Adoption of the entity approach means that each partner has separate legal interests and that the ownership of the partnership assets is in the entity, not as undivided interests of the partners. Property acquired by a partnership becomes property of the partnership as an entity and not of the partners individually [*Corp. Code* § 16203]. A partner is not a co-owner of partnership property and has no interest in it that can be transferred [*Corp. Code* § 16501]. Only the partner's personal property interest ("transferable interest") in his or her share of the partnership profits and losses and the right to receive distributions can be transferred [*Corp. Code* § 16502].

Property is partnership property if acquired in the name of the partnership, or in the name of one or more partners with an indication in the instrument transferring title of the person's capacity as a partner or the existence of a partnership but without an indication of the name of the partnership [*Corp. Code* § 16204(a)]. Property is acquired in the name of the partnership by transfer to either (1) the partnership in its name, or (2) one or more partners in their capacity as partners if the name of the partnership is indicated in the instrument transferring title [*Corp. Code* § 16204(b)].

UPA '94 provides that a partnership may sue and be sued in the partnership name. This follows the entity approach and is declarative of California law under *CCP* § 369.5(a). A judgment against the partnership is not by itself a judgment against a partner [*Corp. Code* § 16307(c)], so a partner must be individually named in the suit and a judgment entered against the partner in order for the partner's personal assets to be the subject of a levy against the partnership.

For more detailed discussion of the treatment of partnership assets, and the rights of partners and the partnership under UPA '94, see Ch. 15, Part A, *Formation of General Partnerships* § 15.11 et seq.

[c] Transfers of Partnership Assets

Under UPA '94, partnership property may be transferred as follows [*see Corp. Code* § 16302(a); *see also Corp. Code* § 16302(b) (recovery of partnership property from transferee)]:

- Subject to the effect of a statement of partnership [*see Corp. Code* § 16303], partnership property held in the name of the partnership may be transferred by an instrument of transfer executed by a partner in the partnership name.
- Partnership property held in the names of some or all of the partners, with an indication in the instrument transferring the property to them of their capacity as partners or of the existence of a partnership, but without an indication of the name of the partnership, may be transferred by an instrument of transfer executed by the partners in whose names the property is held.
- Partnership property held in the name of any other person, except the partnership, without an indication in the instrument transferring the property of the person's capacity as partner or of the existence of the partnership, may be transferred by an instrument of transfer executed by the person in whose name the property is held.

[d] Discharge of Debtor

Ordinarily an assignment for the benefit of creditors and the payment of dividends under the assignment do not result in a discharge of the debtor, except to the extent that the claims of the creditors are reduced by actual payment. However, a provision that the debtor will be released from further liability is binding on creditors who accept the benefits of the assignment [*Boteler v. Robinson* (1930) 105 Cal. App. 611, 615, 288 P. 135 ; *Equitable Life Assur. Soc. v. Jacobson* (1924) 68 Cal. App. 717, 722, 230 P. 200] . For the effect of a release on a creditor with a security interest, see § 78.13[7].

[2] FORM

General Assignment by Partnership and Partners for Benefit of Creditors

AGREEMENT AND ASSIGNMENT FOR THE BENEFIT OF CREDITORS

This agreement is made _____[*date*] by and among _____[*name of partnership*], a California general partnership, _____[*name of partner*], individually and as a general partner of that partnership, _____[*name of partner*], individually and as a general partner of that partnership (all of whom are collectively referred to in this agreement as "the Debtors"), and [*name of assignee*] ("the Assignee"), [*legal status of assignee, e.g., a California corporation*].

RECITALS

A. The Debtors are indebted individually and as partners to various creditors but are financially unable to pay the debts in full.

B. The Debtors desire to apply their individual and partnership assets to the payment of all of their individual and partnership debts so that each creditor receives a fair distribution of the Debtors' assets.

THE PARTIES THEREFORE AGREE AS FOLLOWS:

1. Assignment. The Debtors jointly and severally assign to the Assignee and the Assignee's successors and assigns all property (the "Property") (except property that is exempt by law from enforcement of a money judgment or otherwise exempt from execution or levy and sale) of every kind and wherever situated now held by the Debtors as partners and listed in Exhibit A attached to this agreement; and all property (except property that is exempt by law from enforcement of a money judgment or otherwise exempt from execution or levy and sale) of every kind and wherever situated now held by each of the Debtors individually and listed in Exhibit B attached to this agreement. The legal descriptions of real property owned by the Debtors as partners or by any of them individually are set forth in Exhibits A and B.

2. Debtors' Assets. The Debtors shall deliver possession of the Property to the Assignee. The Assignee shall take possession of all of the Property and convert it into money with reasonable diligence, collect all debts and demands that can be collected, and deposit the proceeds received into separate accounts so that the proceeds attributable to partnership property can be distributed from one account, and proceeds attributable to the individual property of each Debtor can be distributed from a separate account.

3. Priority Claims and Administration Expenses. From the proceeds received under, the Assignee shall pay and discharge all claims entitled to priority or preference under state or federal law and then pay reasonable expenses, costs, and disbursements relating to the execution of this agreement and the discharge of the trust created under it, together with any commissions or allowances to which the Assignee may be entitled for services rendered. The priority claims and administration expenses, costs, disbursements, and commissions shall be charged against the particular account that gave rise to them.

4. Distribution of Proceeds. The Assignee shall distribute the remaining proceeds as follows:

(a) From the proceeds remaining in the partnership account after payment of priority claims and administration expenses under Paragraph 3, the Assignee shall pay and discharge all debts and liabilities now due from the Debtors as partners, including existing but unmatured obligations, together with interest owed on those debts and liabilities. If the amount of the proceeds is insufficient to pay those debts, liabilities, and interest in full, then the Assignee shall apply the proceeds proportionally to the payment of the debts, liabilities, and interest.

(b) After payment in full of all priority claims and administration expenses under Paragraph 3 and all debts and liabilities of the partnership under clause (a), the Assignee shall pay and discharge out of any proceeds remaining in the partnership account, the individual debts and liabilities of each of the Debtors now due, including existing but unmatured obligations, together with interest owed on those individual debts and liabilities. In making these payments, the Assignee shall not permit any part of the proceeds to which one of the Debtors may be entitled, to be applied in payment of the individual debts of the other Debtor. If in the case of either Debtor the proceeds are insufficient to pay the debts, liabilities, and interest of the Debtor in full, the Assignee shall apply the proceeds proportionally to the payment of the debts, liabilities, and interest.

(c) From the proceeds remaining in the individual accounts after payment of priority claims and administration expenses under Paragraph 3, the Assignee shall pay and discharge all debts and liabilities of the Debtors now due, including existing but unmatured obligations, together with all interest owing on those debts and liabilities. In making these payments, the Assignee shall not permit any part of the proceeds of the property of one Debtor to be applied in payment of the individual debts of the other Debtor. If in the case of either Debtor the residue of the proceeds is insufficient to pay the debts, liabilities, and interest in full, the Assignee shall apply the residue proportionally to the payment of the debts, liabilities, and interest.

(d) If the proceeds in the individual accounts, or either of them, exceed the amount necessary to discharge the liabilities payable from those accounts, the Assignee shall apply the surplus to the payment of any partnership debts that remain unpaid in accordance with the provisions for payment set forth above.

(e) If application of all of the proceeds of the partnership account and all of the proceeds of the individual accounts is insufficient to pay in full the partnership debts or the individual debts, thereby authorizing the Assignee to make proportional payments of the debts, the Assignee shall make a proportional distribution only to the holder of any debt, liability, or interest that agrees to accept the proportional amount as payment in full of the debt, liability, or interest, and to release the Debtor from all claims relating to the debt, liability, or interest.

(f) After payment in full of all debts and liabilities of the Debtors as partners and as individuals, the Assignee shall pay any residue of the proceeds in the individual accounts to the Debtors or their legal representatives or assigns, according to their respective rights to those proceeds.

5. Powers of Assignee. In order to fully effectuate this assignment and the trust created under it, the Debtors, jointly and severally, irrevocably appoint the Assignee as attorney in fact, with power of substitution and revocation, and with complete authority and sole discretion to do anything necessary to execute this assignment and the trust created under it, including the authority to do the following: demand and receive from any person all property, debts, and demands belonging and owing to the Debtors as partners or as individuals, and to give acquittances and discharges for the foregoing; to sue for, prosecute, defend, and interplead on account of all of the foregoing property, debts, and demands; to sign or endorse the names of the Debtors or the partnership on any check, draft, note, or other instrument for the payment of money, and on any instrument necessary to effectuate the purposes of this trust; and to execute, acknowledge, and deliver all deeds, instruments of conveyance, receipts, and releases necessary or proper for the execution of the trust created under this assignment. The Debtors shall execute and deliver any instruments requested by

the Assignee that are necessary to carry out the intent and terms of this assignment.

6. Entire Agreement. This agreement supersedes all agreements previously made between the parties relating to its subject matter. There are no other understandings or agreements between them.

7. Acceptance by Assignee. The Assignee accepts the trust created under this assignment and covenants with the Debtors and their legal representatives and assigns that the Assignee shall faithfully and promptly carry out the terms of the trust.

8. Power and Authority to Execute Agreement. Each party has power to execute this agreement. Each party warrants that the individual signing this document as or for that party is duly and fully empowered and authorized to sign for the purpose of executing this agreement and binding that party to the terms of this agreement.

Executed _____[*date*].

DEBTORS

_____ [*name of partnership*]

By _____ [*signature*], on behalf of the Partnership
[*typed name and title*]

_____ [*signature*]

[*typed name*], Partner, individually and as a partner of _____ [*name of partnership*]

_____ [*signature*]

[*typed name*], Partner, individually and as a partner of _____
[*name of partnership*]

ASSIGNEE

_____ [*signature*]

[*typed name*]

[*Add acknowledgment if appropriate; see § 78.204[2].*]

Exhibit A **Partnership Property**

[*Include description of each item of partnership property subject to assignment, including legal descriptions of any real property:*]

[*description of asset*]

[*description of asset*]

[*description of asset*]

[*description of asset*]

[*description of asset*]

Exhibit B

Property of Individual Debtors

[include description of each item of property of individual debtor's that is subject to assignment, including legal descriptions of any real property:]

Description	Owner(s)	How Held
_____	_____ [name(s)]	_____ [e.g., separate property or community property or joint tenancy or other]
_____	_____ [name(s)]	_____ [e.g., separate property or community property or joint tenancy or other]
_____	_____ [name(s)]	_____ [e.g., separate property or community property or joint tenancy or other]
_____	_____ [name(s)]	_____ [e.g., separate property or community property or joint tenancy or other]

Legal Topics:

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

Business & Corporate Law General Partnerships General Overview Contracts Law Debtor & Creditor Relations Contracts Law Performance Assignment General Overview



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DIVISION V: CONTRACTS AND OBLIGATIONS
 CHAPTER 78 CREDITORS' AGREEMENTS: NONBANKRUPTCY ALTERNATIVES
 PART IV. FORMS
 C. Assignments for Benefit of Creditors

27-78 California Legal Forms--Transaction Guide § 78.232

AUTHOR: John A. Vos, Practice Consultant

§ 78.232 General Assignment by Corporation for Benefit of Creditors

[1] Comment--Use of Form

The form in [2], below, is a general assignment by an insolvent corporation for the benefit of its creditors. For detailed coverage of matters relevant to any assignment for the benefit of creditors, including one by a corporation, see §§ 78.13 and 78.230[1]. For a checklist of matters to consider in connection with making an assignment for the benefit of creditors, see § 78.123.

In order for a corporation to sell, lease, convey, exchange, transfer, or otherwise dispose of all or substantially all of its assets, the principal terms of the transaction must be approved by the board and, unless the transaction is in the usual and regular course of its business, approved by the outstanding shares of the corporation [*Corp. Code § 1001(a)*]. Approval by the outstanding shares may be either before or after approval by the board and before or after the transaction [*Corp. Code § 1001(a)*]. For these purposes, "approval of the outstanding shares" means approval by the affirmative vote of a majority of the outstanding shares entitled to vote. This approval includes the affirmative vote of a majority of the outstanding shares of each class or series entitled, by any provision of the articles or the General Corporation Law [*Corp. Code § 100 et seq.*], to vote as a class or series on the subject matter being voted on, and the affirmative vote of any greater proportion (including all) of the outstanding shares of any class or series if the articles or the General Corporation Law require such a greater proportion [*Corp. Code § 152*].

The powers and duties of corporate directors and officers after commencement of a dissolution proceeding include the power to sell at public or private sale, exchange, convey, or otherwise dispose of all or any part of the assets of the corporation for cash in an amount deemed reasonable by the board or on any other terms and conditions that the board deems reasonable or expedient, the power to execute bills of sale and deeds of conveyance in the name of the corporation [*Corp. Code § 2001(g)*], and the power in general to make contracts and to do any and all things in the name of the corporation that may be proper or convenient for the purposes of winding up, settling, and liquidating the affairs of the corporation [*Corp. Code § 2001(h)*]. If the sale or disposition of all or any part of the assets is for cash,

shareholder approval is not required (except for transfers to a buyer in control of or under common control with the selling corporation) [see *Corp. Code* § 2001(g); see also *Corp. Code* § 1001(d)]. If the sale or disposition is for consideration other than cash, shareholder approval is required [see *Corp. Code* § 1001(a)], as is compliance with *Corp. Code* §§ 1200 and 1201 relating to reorganizations.

For further discussion of and forms relating to corporate dissolutions, see Ch. 12, *Winding Up and Dissolution* ; see also Ballantine & Sterling, California Corporation Laws, Ch. 15, *Dissolution and Winding Up* (Matthew Bender).

[2] FORM

General Assignment by Corporation for Benefit of Creditors

AGREEMENT AND ASSIGNMENT FOR THE BENEFIT OF CREDITORS

This agreement is made by _____ [name of corporation] ("the Corporation"), a California corporation, and [name of assignee] ("the Assignee"), for the benefit of creditors of the Corporation.

RECITALS

A. The Corporation has become indebted to various persons in the operation of its business and is unable to pay its debts in full.

B. The Corporation desires to make a fair distribution of its assets among all of its creditors.

C. The board of directors of the Corporation, at a special meeting duly held _____ [date] at its principal place of business, unanimously adopted a resolution authorizing the Corporation's president and secretary to execute and deliver to the Assignee this assignment of all the assets of the Corporation for the benefit of its creditors.

D. Shareholders holding a majority of the outstanding shares of the Corporation entitled to vote have given their written consent to this assignment by the Corporation of all of its assets for the benefit of its creditors.

THE PARTIES THEREFORE AGREE AS FOLLOWS:

1. Assignment of Property. The Corporation assigns to the Assignee, for the benefit of all creditors of the Corporation generally, all property of every kind and wherever situated now held by the Corporation (the "Property"). The Property includes [describe, e.g., all that certain stock of merchandise, store furniture and fixtures, book accounts, books, bills, receivables, cash on hand, choses in action, insurance policies covering any part of the Property, and all other personal property of every kind and nature] situated in or pertaining to the business now owned and conducted by the Corporation at _____ [address]. The legal descriptions of real property owned by the Corporation are set forth in Exhibit A attached to this assignment. The Corporation shall deliver to the Assignee books of account showing all creditors and their addresses and shall execute and deliver to the Assignee on demand any written instruments that are required to vest legal title and establish record title in and to all of the Corporation's real and personal property, or the Corporation's interest in that property, including land, mortgages, trust deeds, motor vehicles, patents, patent applications, and patent rights.

2. Powers and Duties of Assignee. The Assignee shall hold the Property in trust for the following uses and purposes and is given the following authority in connection with that property:

(a) To take charge and possession of the Property and to reduce it to money as soon as this can prudently be done, using

the Assignee's best judgment in selling and disposing of the Property on terms the Assignee deems appropriate at public or private sale, whichever in the judgment of the Assignee is more likely to net the greatest proceeds;

(b) To pay the creditors of the Corporation, proportionally, the net proceeds derived from the sale the Property, after deducting all sums that the Assignee may pay to discharge any lien on any of the Property and any indebtedness that is by California or federal law entitled to priority of payment, and after paying all administration charges and expenses, including the remuneration (in amounts determined by the Assignee) of the Assignee and of any agents or attorneys employed by the Assignee;

(c) To apply for any deposits or refunds, to collect all debts and demands owing the Corporation that can be collected (including any amount that may be due from shareholders on shares issued to or subscribed for by them), and to compromise those debts and demands so as to realize the greatest sum possible; and

(d) To pay the balance or surplus of proceeds, if any, to the Corporation or the Corporation's successors or assigns.

3. Power of Attorney. In order to fully effectuate this assignment and the trust created under it, the Corporation irrevocably appoints the Assignee as attorney in fact, with full power of substitution and revocation, and with complete authority and sole discretion to do anything necessary to carry out the terms of this assignment and the trust created under it, including authority to do the following: to demand and receive from any person all property, debts, and demands belonging and owing to the Corporation, and to give acquittances and discharges for the foregoing; to sue for, prosecute, defend, and interplead on account of all of the foregoing property, debts, and demands; to sign or endorse the Corporation's name on any check, draft, note, or other instrument for the payment of money, and on any instrument necessary to effectuate the purposes of this trust; and to execute, acknowledge, and deliver all deeds, instruments of conveyance, receipts, and releases necessary or proper for the execution of the trust created under this assignment. The Corporation shall execute any instruments requested by the Assignee that are necessary to carry out the intent and terms of this assignment and agreement.

4. Acceptance by Assignee. The Assignee accepts the trust created by this assignment and agreement and covenants with the Corporation and the Corporation's successors and assigns that the Assignee shall faithfully and promptly carry out the terms of the trust.

5. Entire Agreement. This agreement supersedes all agreements previously made between the parties relating to its subject matter. There are no other understandings or agreements between them.

6. Notices. All notices or other documents under this agreement shall be in writing and delivered personally or mailed by first class mail, postage prepaid, to the parties as follows: *[specify]*.

7. Headings. Headings in this agreement are for convenience only and shall not be used to interpret or construe its provisions.

8. Governing Law. This agreement shall be construed in accordance with the laws of the state of California.

9. Counterparts. This agreement may be executed in two or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument.

10. Binding Effect. The provisions of this agreement shall be binding on and inure to the benefit of each of the parties and their respective legal representatives, successors, and assigns.

11. Power and Authority to Execute Agreement. Each party has power to execute this agreement. Each party warrants that the individual signing this document as or for that party is duly and fully empowered and authorized to

sign for the purpose of executing this agreement and binding that party to the terms of this agreement.

Executed _____ [date].

CORPORATION

_____ [name]

By _____ [signature]
[typed name and title]

By _____ [signature]
[typed name and title]

ASSIGNEE

_____ [signature]
[typed name]

[Add acknowledgment if appropriate; see § 78.204[2].]

Exhibit A

Property of Corporation

[Include description of each item of corporate property subject to assignment, including legal descriptions of any real property:]

[description of asset]

[description of asset]

[description of asset]

[description of asset]

[description of asset]

Legal Topics:

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

Business & Corporate LawCorporationsGeneral OverviewContracts LawDebtor & Creditor RelationsContracts LawPerformanceAssignmentGeneral Overview



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 PART IV. FORMS
 C. Assignments for Benefit of Creditors

27-78 California Legal Forms--Transaction Guide § 78.233

AUTHOR: John A. Vos, Practice Consultant

§ 78.233 General Assignment by Limited Liability Company for Benefit of Creditors

[1] Comment--Use of Form

The form in [2], below, is a general assignment by an insolvent limited liability company for the benefit of its creditors. For detailed coverage of matters relevant to any assignment for the benefit of creditors, including one by a limited liability company, see §§ 78.13 and 78.230[1].

Subject to any limitations contained in the articles of organization, and to compliance with the Beverly-Killea Limited Liability Company Act [*see Corp. Code § 17000 et seq.*] and any other applicable laws, a California limited liability company has all of the powers of a natural person in carrying out its business activities, including the power to sell, lease, exchange, transfer, convey, mortgage, pledge, and otherwise dispose of all or any part of its property and assets [*Corp. Code § 17003(e)*]. There is no statutory requirement for approval by the managers or members apart from the foregoing general requirement for conformity with the articles of organization.

A limited liability company in the process of winding up [*see generally Corp. Code § 17350 et seq.*] may not distribute any assets to members until "all the known debts and liabilities of ... [the company], including, without limitation, debts and liabilities to members who are creditors of the ... company, have been paid or adequately provided for" [*Corp. Code § 17353(a)*]. Implicitly, therefore, the company's general power to "dispose of all or any part of its property and assets" [*Corp. Code § 17003(e)*] must be exercised primarily for the benefit of the company's creditors [*cf. Corp. Code § 17355(a)(1)(B)* (creditor having cause of action against dissolved limited liability company can pursue assets distributed to members)].

After the company has been dissolved, it nevertheless continues to exist for the purpose of winding up its affairs, prosecuting and defending actions by or against it in order to collect and discharge obligations, disposing of and conveying its property, and collecting and dividing its assets [*Corp. Code § 17354(a)*].

For further discussion of and forms relating to limited liability companies, see Ch. 12C, *Limited Liability Companies* .

[2] FORM

General Assignment by Limited Liability Company for Benefit of Creditors

AGREEMENT AND ASSIGNMENT FOR THE BENEFIT OF CREDITORS

This agreement is made by _____ [*name of limited liability company*] ("the Company"), a California limited liability company, and [*name of assignee*] ("the Assignee"), for the benefit of creditors of the Company.

RECITALS

A. The Company has become indebted to various persons in the operation of its business and is unable to pay its debts in full.

B. The Company desires to make a fair distribution of its assets among all of its creditors.

C. In conformity with the Company's articles of organization, the managers and members of the Company have duly approved the making of this assignment for the benefit of creditors.

THE PARTIES THEREFORE AGREE AS FOLLOWS:

1. Assignment of Property. The Company assigns to the Assignee, for the benefit of all creditors of the Company generally, all property of every kind and wherever situated now held by the Company (the "Property"). The Property includes [*describe, e.g., all that certain stock of merchandise, store furniture and fixtures, book accounts, books, bills, receivables, cash on hand, choses in action, insurance policies covering any part of the Property, and all other personal property of every kind and nature*] situated in or pertaining to the business now owned and conducted by the Company at _____ [*address*]. The legal descriptions of real property owned by the Company are set forth in Exhibit A attached to this assignment. The Company shall deliver to the Assignee books of account showing all creditors and their addresses and shall execute and deliver to the Assignee on demand any written instruments that are required to vest legal title and establish record title in and to all of the Company's real and personal property, or the Company's interest in that property, including land, mortgages, trust deeds, motor vehicles, patents, patent applications, and patent rights.

2. Powers and Duties of Assignee. The Assignee shall hold the Property in trust for the following uses and purposes and is given the following authority in connection with that property:

(a) To take charge and possession of the Property and to reduce it to money as soon as this can prudently be done, using the Assignee's best judgment in selling and disposing of the Property on terms the Assignee deems appropriate at public or private sale, whichever in the judgment of the Assignee is more likely to net the greatest proceeds;

(b) To pay the creditors of the Company, proportionally, the net proceeds derived from the sale the Property, after deducting all sums that the Assignee may pay to discharge any lien on any of the Property and any indebtedness that is by California or federal law entitled to priority of payment, and after paying all administration charges and expenses, including the remuneration (in amounts determined by the Assignee) of the Assignee and of any agents or attorneys employed by the Assignee;

(c) To apply for any deposits or refunds, to collect all debts and demands owing the Company that can be collected

(including any amounts that may be due from members), and to compromise those debts and demands so as to realize the greatest sum possible; and

(d) To pay the balance or surplus of proceeds, if any, to the [*specify, e.g., Company or Company's successors or assigns or members of the Company as their interests shall appear*].

3. Power of Attorney. In order to fully effectuate this assignment and the trust created under it, the Company irrevocably appoints the Assignee as attorney in fact, with full power of substitution and revocation, and with complete authority and sole discretion to do anything necessary to carry out the terms of this assignment and the trust created under it, including authority to do the following: to demand and receive from any person all property, debts, and demands belonging and owing to the Company, and to give acquittances and discharges for the foregoing; to sue for, prosecute, defend, and interplead on account of all of the foregoing property, debts, and demands; to sign or endorse the Company's name on any check, draft, note, or other instrument for the payment of money, and on any instrument necessary to effectuate the purposes of this trust; and to execute, acknowledge, and deliver all deeds, instruments of conveyance, receipts, and releases necessary or proper for the execution of the trust created under this assignment. The Company shall execute any instruments requested by the Assignee that are necessary to carry out the intent and terms of this assignment and agreement.

4. Acceptance by Assignee. The Assignee accepts the trust created by this assignment and agreement and covenants with the Company, the Company's members, and the Company's successors and assigns, that the Assignee shall faithfully and promptly carry out the terms of the trust.

5. Entire Agreement. This agreement supersedes all agreements previously made between the parties relating to its subject matter. There are no other understandings or agreements between them.

6. Notices. All notices or other documents under this agreement shall be in writing and delivered personally or mailed by first class mail, postage prepaid, to the parties as follows: [*specify*].

7. Headings. Headings in this agreement are for convenience only and shall not be used to interpret or construe its provisions.

8. Governing Law. This agreement shall be construed in accordance with the laws of the state of California.

9. Counterparts. This agreement may be executed in two or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument.

10. Binding Effect. The provisions of this agreement shall be binding on and inure to the benefit of each of the parties and their respective legal representatives, successors, and assigns.

11. Power and Authority to Execute Agreement. Each party has power to execute this agreement. Each party warrants that the individual signing this document as or for that party is duly and fully empowered and authorized to sign for the purpose of executing this agreement and binding that party to the terms of this agreement.

Executed _____[*date*].

COMPANY

_____ [*name*]

By _____ [*signature*]

[*typed name and title*]

By _____ [*signature*]

[*typed name and title*]

ASSIGNEE

_____ [signature]

[*typed name*]

[Add acknowledgment if appropriate; see § 78.204[2].]

Exhibit A
Property of Company

[Include description of each item of LLC's property subject to assignment, including legal descriptions of any real property:]

[description of asset]

[description of asset]

[description of asset]

[description of asset]

[description of asset]

Legal Topics:

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

Business & Corporate Law Limited Liability Companies General Overview Contracts Law Debtor & Creditor
Relations Contracts Law Performance Assignment General Overview



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DIVISION V: CONTRACTS AND OBLIGATIONS
CHAPTER 78 CREDITORS' AGREEMENTS: NONBANKRUPTCY ALTERNATIVES
PART IV. FORMS
C. Assignments for Benefit of Creditors

27-78 California Legal Forms--Transaction Guide §§ 78.234-78.239

AUTHOR: John A. Vos, Practice Consultant

[Reserved]

§§ 78.234[Reserved]



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 D. Related Notices

27-78 California Legal Forms--Transaction Guide § 78.240

AUTHOR: John A. Vos, Practice Consultant

§ 78.240 Notice of General Creditors' Meeting

[1] Comment--Use of Form

The form in [2], below, is a notice to creditors of a meeting for discussion of the causes of the debtor's financial problems and the prospects for rehabilitation. The debtor will present a rehabilitation plan at the meeting. For an outline of the minimum information that should be presented in such a plan, see § 78.122.

One of the purposes of an initial meeting of creditors is to determine whether the creditors as a group are willing to cooperate with the debtor in some type of out-of-court rehabilitation plan. A minority of creditors can effectively prevent the success of a rehabilitation plan [see § 78.12[1]]. However, if dissident creditors represent only a small percentage of the outstanding indebtedness, the majority creditors may elect to pay them in full the amounts owed to them by the debtor, if the amount that the majority creditors will receive under a consummated rehabilitation plan is greater than it would be under a bankruptcy reorganization or liquidation.

For a guide to the importance of giving proper notice of a creditors' meeting, in regard to the selection of a creditors' committee [see *Fed. R. Bankr. P.*, Rule 2007], see § 78.121.

[2] FORM

Notice of Creditors' Meeting

NOTICE OF CREDITORS' MEETING

_____ [date]

TO THE CREDITORS OF:

_____[*name of debtor*]
_____[*address*]
_____[*city, state, zip*]

_____[*Name of debtor*] requests that a meeting of unsecured creditors be held
_____[*date*] at [*time*] at _____[*address of meeting location*] to discuss the financial
problems of _____[*name of debtor*], their causes, and the prospects for _____[*name*
of debtor]'s financial rehabilitation. _____[*name of debtor*] will distribute current financial statements
and present a plan for the payment of creditors. _____[*name of debtor*] has been in business for
[*number*] years and, with continued support from creditors, will be able to resolve the current financial problems.

All creditors are invited to attend or be represented at the meeting. Questions prior to the meeting can be directed to the debtor's attorney. Your cooperation in this matter is appreciated.

Legal Topics:

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

Bankruptcy LawCase AdministrationGeneral OverviewContracts LawDebtor & Creditor Relations



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27-78 California Legal Forms--Transaction Guide § 78.241

AUTHOR: John A. Vos, Practice Consultant

§ 78.241 Status Report to Creditors Regarding Debtor's Liquidation

[1] Comment--Use of Form

The form in [2], below, is an illustration of a status report, which may be used by a creditors' committee or its agent as a model for the purpose of explaining to all of the interested creditors what progress has been made in liquidating the debtor's business. Although the attorney ordinarily would not prepare or sign this report, he or she may be called upon to review its content prior to dissemination. For the sake of illustration, a hypothetical business is referred to in the form; it is a large supplier to the construction industry. Since the details of such a report will be unique to each specific situation, this form is only an illustration, to be used as a model of how a progress report could be written.

Creditors involved in liquidating a business want to proceed in a manner most likely to produce the greatest return to them. To accomplish this, it may be necessary to permit certain projects of the business to continue until completion and to sell certain assets for the highest possible price, as illustrated by this form. Meetings and cooperation with various persons and organizations, including the debtor, the creditors' attorney, and representatives of holders of any secured claims, are essential to an expeditious liquidation. As progress is made, the agent should send the creditors' committee periodic status reports.

Ordinarily an agent of the creditors' committee would do the actual preparation of the report, and for that reason, this form is drafted as a report from such an agent to the creditors. A committee's agent usually is a specialist in the business; an individual or firm that offers services, for a fee, to expedite implementation of assignment agreements. In some cases a committee might work without an agent, in which case the committee would report directly to other creditors.

[2] FORM

Status Report to Creditors

STATUS REPORT TO CREDITORS

_____ [date]

TO THE CREDITORS OF:

_____ [name of debtor], debtor

_____ [address]

_____ [city, state, zip]

FROM: [name and title of preparer of report, e.g., agent or consultant of creditors' committee]

[State progress toward liquidating assets; for example:]

1. Contract in Progress. We have made a survey of the debtor's only remaining major contract, which is for the fabrication and delivery of building components for the construction of the Main Street Bridge in Wild River, California. Completion of this contract will require considerable time; our best estimate is six months. We are concerned that the labor costs should fall within estimates, and we intend to closely observe this factor as the contract progresses. Arrangements are being made to move necessary equipment and labor to the job site, which will materially reduce overhead and expense.

2. Branch Locations. Liquidation is underway at the debtor's branch stores. All of the branch locations have been closed and two have been sold. Negotiations for the sale of the third branch store are in progress.

3. Other Security. Last week we inspected the debtor's real estate holdings. As you know, these holdings are security for the debtor's obligations to creditors. We feel that these holdings are of substantial value. We have already arranged to obtain expert opinions to guide decisions respecting their disposition. The debtor has a current inquiry from an interested purchaser as to a substantial piece of unimproved real estate in Sierra County, California.

4. Manufacturing Location. The debtor's manufacturing plant at Industrial City, California, is rented from the State of California on a month-to-month basis. It is located in the path of a planned freeway and must be vacated in the very near future.

5. Inventory and Equipment. With the curtailment of operations, a great deal of equipment and inventory became superfluous. Efforts to negotiate their sale have to date been unsuccessful. It is my opinion that a public auction sale should be held as soon as one can be properly arranged and advertised. We estimate that July 1st is the earliest that such a sale could be arranged. Since the Great California Bank has a large loan secured by a warehouse arrangement on the debtor's inventory of raw materials, it is necessary to obtain the bank's consent to the proposed sale. We have been assured by a bank officer that approval would be forthcoming. As soon as all of the details in connection with the proposed auction sale have been completed, and the advertising circulars prepared, a full report will be sent to you. We will keep you informed as to significant developments that affect your interests.

6. Accounts Receivable. In the coming week, we will determine the status of accounts receivable. I will then establish collection procedures for accounts substantially past due.

7. Other Creditors. We now have consents from creditors with claims aggregating \$1,543,000.

8. Creditors' Committee. We met with the creditors' committee and its counsel for several hours. The debtor's attorney and a representative of Great California Bank were also present. It appears that there will be some change in the structure of the committee. We will inform you as soon as this proposed change becomes final.

9. Evaluation. Based on the foregoing developments, we are hopeful that we will soon have the majority of creditors working for the common purpose of maximum recovery on the account in the shortest possible time.

Legal Topics:

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

Bankruptcy LawCase AdministrationGeneral OverviewBankruptcy LawLiquidationsGeneral OverviewContracts
LawDebtor & Creditor Relations



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27-78 California Legal Forms--Transaction Guide § 78.242

AUTHOR: John A. Vos, Practice Consultant**§ 78.242 Notice of Assignee's Sale****[1] Comment--Use of Form**

The form in [2], below, may be used as a model for a notice to potential buyers that the assignee under an assignment for the benefit of creditors is conducting a sale of the debtor's property. Descriptions of the sale property are illustrative and intended to give an idea of the format and nature of the descriptions typically included in such a notice.

The assignee normally would distribute and publish the notice so as to reach the largest number of potential buyers, since it is in the best interests of both the debtor and the creditors to obtain the highest amount of sale proceeds. The assignee typically sends an accompanying notice or letter to the affected creditors or their creditors' committee, informing them of the time and location of the meeting at which the sealed bids will be opened [see § 78.243].

[2] FORM**Notice of Assignee's Sale**

NOTICE OF ASSIGNEE'S SALE

RE: _____[*name of debtor*]
 _____[*address*]
 _____[*city, state, zip*]

The assignee under an assignment for the benefit of creditors offers the following property for sale, at auction by sealed bid (dollar amounts indicate the minimum bid):

- LOT 1. Office furniture and equipment: \$_____.
- LOT 2. Printing plant equipment (presses, bindery, darkroom, and plate facility):
 \$_____.

- LOT 3. Unprinted paper stock rolls, sheets, envelopes, preprinted boxes, and shipping materials: \$_____.
- LOT 4. Printed forms and columnar pads: \$_____ (Contract Balance Due \$_____, Original Cost \$_____).
- LOT 5. One _____ [*name of manufacturer*] collator: \$_____.
- LOT 6. One _____ [*name of manufacturer*] press: \$_____.
- LOT 7. One _____ [*name of manufacturer*] postage meter: \$_____.
- LOT 8. One _____ [*name of manufacturer*] computer, model _____: \$_____.

The Assignee is soliciting SEALED BIDS for lots 1, 2, 3, and 4, as a whole, but bids should specifically set forth the amount bid for each lot.

In bidding on lots 5 through 8, the bidder should submit a SEPARATE SEALED BID for each.

OPEN FOR INSPECTION: _____ [*day and date*] from _____ A.M. through _____ P.M.

DATE AND TIME OF SALE: _____ [*day, date, and time*]

PLACE OF SALE: _____ [*name of organization*], _____ [*address*], _____ [*city, state, zip*]

TERMS AND CONDITIONS: All cash on acceptance of bid

FOR INFORMATION CALL: _____ [*name*], Assignee, at [*telephone number*]

Legal Topics:

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

Contracts Law Debtor & Creditor Relations Contracts Law Performance Assignment General Overview Contracts Law Sales of Goods General Overview



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27-78 California Legal Forms--Transaction Guide § 78.243

AUTHOR: John A. Vos, Practice Consultant

§ 78.243 Cover Letter to Creditors Regarding Assignee's Sale

[1] Comment--Use of Form

The form in [2], below, is a cover letter that may be sent to creditors (or a creditors' committee) with a notice of an assignee's sale [see § 78.242]. It requests the creditors to contact potential buyers and to inform them of the sale, and also notifies the creditors of the date the sealed bids will be opened.

[2] FORM

Cover Letter to Creditors Regarding Assignee's Sale

_____ [date]

TO THE CREDITORS OF:

_____ [name of debtor] (debtor)
_____ [address]
_____ [city, state, zip]

Enclosed is a "Notice of Assignee's Sale" that reflects the results of the inventory of the debtor's assets recently completed. Bids for the purchase of the assets will be opened at this office on _____ [date]. At that time, the creditors' committee will review the bids. Shortly thereafter, a further report will be forwarded to the creditors concerning the amounts realized.

If you know of any persons interested in the purchase of these assets, please contact them immediately to provide them

with the opportunity to inspect the assets on the day designated in the notice and to present their bids by the deadline date and time.

If you have any questions regarding this matter, please contact the undersigned.

_____ *[name of assignee]*

By _____ *[signature]*

[typed name and title]

Telephone: _____

FAX: _____

Email: _____

Legal Topics:

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

Contracts LawDebtor & Creditor RelationsContracts LawPerformanceAssignmentGeneral OverviewContracts
LawSales of GoodsGeneral Overview



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CHAPTER 79 SURETYSHIP, GUARANTY, AND INDEMNITY

27-79 California Legal Forms--Transaction Guide 79.syn

§ 79.syn Synopsis to Chapter 79: SURETYSHIP, GUARANTY, AND INDEMNITY

§ 79.01 California Sources

[1] California Statutes

[a] In General

[b] Commercial Code

[c] Indemnity

[d] Miscellaneous Bonds

[e] Suretyship

[2] California Regulations

§ 79.02 Federal Statutes

§§ 79.03-79.04 [Reserved]

§ 79.05 Law Reviews

§ 79.06 Annotations

§ 79.07 Text References

[1] Matthew Bender Sources

[2] Additional Sources

§§ 79.08-79.09 [Reserved]

§ 79.10 General Considerations

§ 79.11 Definition of Suretyship and Guaranty

[1] Terms Are Generally Synonymous

[2] As Primary or Secondary Obligor

§ 79.12 Surety Insurance

§ 79.13 Creation of Suretyship

§ 79.14 Interpretation of Suretyship

§ 79.15 Liability Imposed by Law on Sureties

§ 79.16 Continuing Guaranty

§ 79.17 Exoneration of Sureties

§ 79.18 Rights of Sureties

§ 79.19 Obligee's Rights Against Security Given to Surety

§ 79.20 Guarantor's Waiver of Rights and Defenses

[1] Governing Law

[2] Waivers Executed on or After January 1, 1997

[3] Waivers Executed From January 1, 1995, to January 1, 1997

§ 79.21 Definitions of Indemnity and Insurance

§ 79.22 Indemnification of Acts and Parties

§ 79.23 Interpretation of Indemnity Agreement

§ 79.24 Indemnity in Connection With Construction Contracts

§ 79.25 Indemnity Agreements in Connection With Hauling, Trucking, or Cartage Contracts

§ 79.26 Relation of Suretyship to Indemnity

§ 79.27 The Use of Suretyship/Guaranty Versus Indemnity

§ 79.28 Number of Agreements Involved

§ 79.29 Number of Parties Involved

§ 79.30 Determining Party to Be Protected

§ 79.31 Third-Party Indemnity Agreements

§ 79.32 Approval by Attorney General of Bonds Required by State Agencies

§§ 79.33-79.49 [Reserved]

§ 79.50 Nature and Application

§ 79.51 Definitions

[1] Admitted Surety Insurer

[2] Beneficiary

[3] Bond

[4] Officer

[5] Principal

[6] Surety

[7] Undertaking

§ 79.52 Use of Bonds and Undertakings in Lieu of One Another

§ 79.53 Contents and Execution

§ 79.54 Approval

§ 79.55 Effect and Duration of Bond

§ 79.56 Personal Sureties

[1] Qualifications

[2] Affidavits

§ 79.57 Admitted Surety Insurers

[1] Acceptance and Approval of Surety on Bond

[2] Objection to Sufficiency

[3] Limitation on Admitted Insurer's Aggregate Liability

§ 79.58 Deposit in Lieu of Bond

[1] Requirements for Deposit

[2] Payment of Interest to Principal

[3] Use of Deposit to Satisfy Principal's Liability

[4] Return of Deposit

§ 79.59 Deposits With Secretary of State

§ 79.60 Insufficient and Excessive Bonds

§ 79.61 New, Additional, and Supplemental Bonds

§ 79.62 Cancellation of Bond or Withdrawal of Sureties

§ 79.63 Liability of Principal and Sureties

§ 79.64 Enforcing Liability on Bond for Benefit of State

§§ 79.65-79.99 [Reserved]

§ 79.100 Facts for All Bonds

Scope

§ 79.101 Additional Facts for Bonds Governed by Bond and Undertaking Law

Scope

§ 79.102 Additional Facts for Public Official Bonds

Scope

§ 79.103 Additional Facts for Lost Security or Instrument Bonds

Scope

§ 79.104 Additional Facts for Construction Contract Bonds

Scope

§ 79.105 Documents

Scope

§§ 79.106-79.109 [Reserved]

§ 79.110 Basic Determinations

Scope

§ 79.111 Suretyship

Scope

§ 79.112 Indemnity

Scope

§ 79.113 Qualification of Principal

Scope

§ 79.114 Determinations Under Bond and Undertaking Law

Scope

§§ 79.115-79.119 [Reserved]

§ 79.120 Availability and Form of Agreement

Scope

§ 79.121 Procedures Under Bond and Undertaking Law

Scope

§§ 79.122-79.129 [Reserved]

§ 79.130 Reduction of Amount or Cancellation of Bond

Scope

§ 79.131 New, Additional, and Supplemental Bonds

Scope

§§ 79.132-79.199 [Reserved]

§ 79.200 License or Permit Bond

[1] Comment

[a] Use of Form

[b] Classes of License and Permit Bonds

[c] Contents of Bond

[d] Stipulation Limiting Liability

[e] Service of Bond

[f] Approval of Bond

[g] Effectiveness and Duration of Bond

[2] FORM

License or Permit Bond

§ 79.201 Declaration of Qualifications of Personal Surety

[1] Comment

[a] Use of Form

[b] Contents of Declaration

[2] FORM

Declaration of Qualifications of Surety

§ 79.202 Probate Bond

[1] Comment

[a] Use of Form

[b] Amount of Bond

[c] Approval of Bond

[d] Term of Bond

[e] Limitation Period for Action on Bond

[2] FORM

Probate Bond

§ 79.203 Notary Public Bond

[1] Comment

[a] Use of Form

[b] Revocation of Bond by Surety

[2] FORM

Notary Public Bond

§ 79.204 General Purpose Surety Bond Form

[1] Comment--Use of Form

[2] FORM

General Purpose Surety Bond Form

§ 79.205 Bond of Discount Buying Organization [Form SFSB-408-2]

[1] Comment

[a] Use of Form

[b] Filing and Fees

[2] FORM

Bond of Discount Buying Organization [Form SFSB-408]

§ 79.206 Bond of Commercial Fundraiser for Charitable Purposes [Form CT-4CF]

[1] Comment--Use of Form

[2] FORM

Bond of Commercial Fundraiser for Charitable Purposes [Form ct-4-CF]

§ 79.207 Bond of Seller [BOE-445]

[1] Comment--Use of Form

[2] FORM

Bond of Seller [BOE-445]

§ 79.208 Miscellaneous Indemnity Bond

[1] Comment--Use of Form

[2] FORM

Miscellaneous Indemnity Bond

§§ 79.209-79.219 [Reserved]

§ 79.220 Public Official Bond--Unconditional

[1] Comment

[a] Use of Form

[b] Obligations of Public Official Bonds

[c] Approval of Public Official Bonds

[d] Recording and Filing of Public Official Bonds

[e] Obtaining Copies of Public Official Bonds

[2] FORM

Public Official Bond--Unconditional

§ 79.221 Public Official Bond--Alternative Form

[1] Comment--Use of Form

[2] Form

Public Official Bond--Alternative Form

§ 79.222 Public Official Bond--Conditional

[1] Comment--Use of Form

[2] Form

Public Official Bond-Conditional

§§ 79.223-79.229 [Reserved]

§ 79.230 Lost Securities Bond

[1] Comment

[a] Use of Form

[b] Issuer Required to Replace Certificated Security

[2] FORM

Lost Securities Bond

§ 79.231 Lost Note Bond

[1] Comment--Use of Form

[2] FORM

Lost Note Bond

§§ 79.232-79.239 [Reserved]

§ 79.240 Bid Bond

[1] Comment--Use of Form

[2] Form

Bid Bond

§ 79.241 Performance Bond

[1] Comment

[a] Use of Form

[b] Terms of Bond

[2] FORM

Performance Bond

§ 79.242 Performance Bond--Short Form

[1] Comment--Use of Form

[2] FORM

Performance Bond--Short Form

§ 79.243 Performance Bond--Dual Obligees

[1] Comment--Use of Form

[2] FORM

Performance Bond--Dual Obligees

§ 79.244 Labor and Materials Payment Bond--Private Work

[1] Comment

[a] Use of Form

[b] Definitions in California Mechanics' Lien Law

[c] Prohibited Provisions

[d] Recording

[e] Time for Commencing Action on Bond

[f] Notice Prior to Commencement of Action on Bond

[2] Form

Labor and Materials Payment Bond--Private Work

§ 79.245 Labor and Materials Payment Bond--Private Work--Alternate Form

[1] Comment--Use of Form

[2] FORM

Labor and Materials Payment Bond--Private Work--Alternate Form

§ 79.246 Labor and Material Payment Bond--Private Work--Dual Oblige

[1] Comment--Use of Form

[2] FORM

Labor and Material Payment Bond--Private Work--Dual Oblige

§ 79.247 Combined Performance and Payment Bond--Private Work--Dual Oblige

[1] Comment--Use of Form

[2] FORM

Combined Performance and Payment Bond--Private Work--Dual Oblige

§§ 79.248-79.259 [Reserved]

§ 79.260 Corporate Resolution Authorizing Guaranty Agreement

[1] Comment--Use of Form

[2] Form

Corporate Resolution Authorizing Guaranty Agreement

§ 79.261 Guaranty Agreement--Long Form

[1] Comment

[a] Use of Form

[b] Provisions Protecting Oblige

[c] Guaranties Subject to Law of Suretyship

[d] Guarantor's Liability

[e] Continuing Guaranty

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§ 79.262 Guaranty Agreement--Short Form

[1] Comment

[a] Use of Form

[b] Relationship of Sureties to Guarantors

[2] FORM

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§ 79.263 Guaranty of Negotiable Instrument

[1] Comment

[a] Use of Form

[b] Guaranty of Payment

[c] Guaranty of Collection

[2] FORM

Guaranty of Negotiable Instrument

§ 79.264 Guaranty Agreement by Assignor of Promissory Note Secured by Deed of Trust

[1] Comment--Use of Form

[2] FORM

Guaranty Agreement by Assignor of Promissory Note Secured by Deed of Trust

§§ 79.265-79.269 [Reserved]

§ 79.270 Corporate Resolution Authorizing Third-Party Indemnity Agreement

[1] Comment--Use of Form

[2] FORM

Corporate Resolution Authorizing Third-Party Indemnity Agreement

§ 79.271 Third-Party Indemnity Agreement

[1] Comment

[a] Use of Form

[b] Effectiveness of Agreement

[2] FORM

Third-Party Indemnity Agreement

§ 79.272 Third-Party Indemnity Agreement--Alternative Form

[1] Comment--Use of Form

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Third-Party Indemnity Agreement--Alternative Form

§ 79.273 Two-Party Indemnity Agreement

[1] Comment--Use of Form

[2] FORM

Two-Party Indemnity Agreement

§ 79.274 Two-Party or Third-Party Indemnity Agreement

[1] Comment--Use of Form

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§ 79.275 Short Form Indemnity Agreement

[1] Comment--Use of Form

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27-79 California Legal Forms--Transaction Guide Scope

Scope

Scope

This chapter deals with suretyship bonds and undertakings entered into in the regular course of business by surety companies (insurers), and by individuals and other entities in connection with particular licenses, permits, and transactions.

- The distinctions, similarities and relationships between suretyship, guaranty, indemnity, and insurance are explained.
- The Bond and Undertaking Law [*Code Civ. Proc.* §§ 995.010-996.560], which standardized the procedural rules governing bonds and undertakings given pursuant to any California statute [*see Code Civ. Proc.* § 995.020(a)], is discussed in detail.
- Guaranties of notes and continuing guaranties of loan payments are also covered.

This chapter points out in general terms the possibilities for use of the protection afforded by a surety (and shows when this protection is normally required), explains how and why guaranties and surety bonds are obtained, and provides language usable in surety obligations. The coverage of indemnity agreements deals mainly with their use in connection with surety agreements and contracts that have surety bonds written in connection with them.

Requirements for suretyship, guaranty, and indemnity in connection with many specific types of transactions are discussed in the chapters covering those transactions.



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§ 79.01 California Sources

[1] California Statutes

[a] In General

Bond and Undertaking Law. *Code Civ. Proc. § 995.010 et seq.*

Approval by Attorney General of bond required by state agencies. *Gov. Code § 11110 et seq.*

Definition of insurance. *Ins. Code §§ 22, 23.*

[b] Commercial Code

Guaranties of negotiable instruments. *Com. Code § 3419.*

Discharge of indorsers and accommodation parties. *Com. Code § 3506.*

[c] Indemnity

Definition of indemnity. *Civ. Code § 2772.*

Indemnification of acts of parties. *Civ. Code §§ 2773-2777.*

Interpretation of indemnity agreement. *Civ. Code § 2778.*

Indemnity in connection with construction contracts. *Civ. Code § 2782 et seq.*

Indemnity agreements in connection with hauling, trucking, or cartage contracts. *Civ. Code* § 2784.5.

[d] Miscellaneous Bonds

Labor and material liens. *Civ. Code* § 3082 *et seq.*

Proceedings on construction bonds. *Civ. Code* § 3225 *et seq.*

Insurance broker's bond. *Ins. Code* §§ 1662-1665.

Contractors' performance bonds, failure or refusal to accept application or issue due to discrimination. *Ins. Code* § 12095.

Foreign vehicle ownership bond. *Veh. Code* §§ 4307, 4315.

[e] Suretyship

Definition of suretyship and guaranty. *Civ. Code* § 2787.

Continuing guaranty. *Civ. Code* §§ 2787, 2814, 2815.

Creation of suretyship. *Civ. Code* §§ 2788-2795.

Interpretation of suretyship. *Civ. Code* §§ 2799-2802.

Liability imposed by law on sureties. *Civ. Code* §§ 2806-2811.

Exoneration of sureties. *Civ. Code* §§ 2819-2825.

Rights of sureties. *Civ. Code* §§ 2832-2850.

Obligee's rights against security given to surety. *Civ. Code* § 2854.

[2] California Regulations

Bonds issued in accordance with Secretary of State's Business Programs. *2 Cal. Code Reg.* §§ 21900 *et seq.*

Bond forms approved by Attorney General. *11 Cal. Code Reg.* §§ 25-110.

Legal Topics:

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

Contracts Law Negotiable Instruments Enforcement Duties & Liabilities of Parties Types of Parties Drawers & Makers Contracts Law Types of Contracts Guaranty Contracts



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§ 79.02 Federal Statutes

Construction and supply contracts with United States-payment and performance bonds (Miller Act). *40 U.S.C. § 270(a)-(e)*

Legal Topics:

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

Commercial Law (UCC)Leases (Article 2A)Formation & ConstructionFormationContracts LawTypes of
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Legal Topics:

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

Civil Procedure Remedies Bonds Sureties General Overview Civil Procedure Remedies Bonds Sureties Liability Contracts Law Types of Contracts Guaranty Contracts



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Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 79.07 Text References

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Legal Topics:

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

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§ 79.10 General Considerations

A person about to enter into a financial or business transaction should consider the necessity or desirability of obtaining additional protection and assurance that the agreement will be carried out by the other party or that no uncompensated loss or liability will result. Logically, the individual should first determine that protection is needed and then decide on the type of protective arrangement best suited to the particular situation. However, in many types of transactions, it is customary for a certain type of protection to be employed.

Legal Topics:

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

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§ 79.11 Definition of Suretyship and Guaranty

[1] Terms Are Generally Synonymous

A surety or guarantor is one who promises to answer for the debt, default, or miscarriage of another, or hypothecates property as security therefor. All distinctions between sureties and guarantors have been abolished, and these terms and their derivatives, whenever used in the law of California, have the same meaning. Special phrases referring to guaranties, used in the codes or in common usage, and in particular "guaranties of collection" and "continuing guaranties" are forms of suretyship and, except insofar as necessary in order to give effect to provisions specially relating thereto, are subject to the laws relating to suretyship in general. A letter of credit (as defined in *Com. Code* § 5102(a)(10)) is not a form of suretyship obligation [*Civ. Code* § 2787].

A broad, descriptive definition of suretyship has been stated as follows: A secondary obligor has a suretyship status whenever all of the following occur [*Restatement of Suretyship and Guaranty* (3d), § 1(1)]:

- Pursuant to a contract (the "secondary obligation"), an obligee has recourse against a person (the "secondary obligor") or that person's property with respect to the obligation (the "underlying obligation") of another person (the "principal obligor") to that obligee.
- To the extent that the underlying obligation or the secondary obligation is performed, the obligee is not entitled to performance of the other obligation.
- As between the principal obligor and the secondary obligor, it is the principal obligor who ought to perform the underlying obligation or bear the cost of performance.

This definition also makes guaranty a synonym for suretyship.

The spelling "guaranty" should be used when the word is used as a noun and the spelling "guarantee" should be used when the word is used as a verb meaning to assume a suretyship obligation.

Other jurisdictions define "suretyship" and "guaranty" in various ways. Some make the words synonymous, as in California. Others make one of the words broader in meaning and use the other for a particular type of arrangement included within the broader term. Still others give each of the words restrictive, particular meanings so that the entire field of suretyship, as defined above, is not covered.

[2] As Primary or Secondary Obligor

Guaranty was defined in California before 1939 to make it, in effect, a particular type of suretyship in which the guarantor's promise was completely independent of the debtor's obligation and the guarantor was required to perform when the underlying obligation matured without the necessity of exhausting the creditor's remedies against the debtor. This distinction is no longer made, and so arrangements labeled either suretyship or guaranty may or may not require some action against the debtor by the creditor before the guarantor's or surety's obligation to perform arises. For example, in connection with negotiable instruments, if an accommodation party signs an instrument to guarantee payment, the accommodation party must pay the instrument in the capacity in which he or she has signed [*Com. Code* § 3419(a), (b)]. However, if the instrument unambiguously indicates that the accommodation party is guaranteeing collection rather than guaranteeing payment, the accommodation party is obliged to pay the amount due on the instrument only in the following situations [*Com. Code* § 3419(d)]:

- Execution of judgment against the other party has been returned unsatisfied;
- The other party is insolvent or in an insolvency proceeding;
- The other party cannot be served with process; or
- It is otherwise clear that payment cannot be obtained from the other party.

Legal Topics:

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

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§ 79.12 Surety Insurance

"Surety insurance" is the guaranteeing of the behavior of persons and the performance of contracts, other than insurance policies and other than for payments secured by a mortgage or deed of trust or other instrument constituting a lien or charge on real property [*Ins. Code § 105(a)*].

The term also includes insurance against loss from forgery or alteration of instruments [*Ins. Code § 105(b)*], and certain varieties of insurance when included as a part of a contract containing a guaranty of personal behavior or contractual performance, or when included as a part of a contract indemnifying a bank, a broker, a financial or moneyed corporation or association, a state, a political subdivision, a public or municipal corporation, or public officer [*Ins. Code § 105(c)*].

No insurance may be written as surety insurance if it falls within the definition of financial guaranty insurance [*Ins. Code § 105(d)*; see *Ins. Code § 12100(a)* ("financial guaranty insurance" defined)].

Legal Topics:

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

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§ 79.13 Creation of Suretyship

Consideration to the surety is required for a binding suretyship arrangement, except if it is entered into at the same time as the underlying obligation, or at the time it is accepted by the creditor, and forms a part of the consideration to the creditor [*Civ. Code* § 2792].

Although the writing need not express a consideration, a suretyship agreement must be in writing and signed by the surety, except in the following situations [*Civ. Code* § 2793]. The writing need not be executed at the same time as the oral suretyship agreement or underlying obligation [see *Fidelity & Deposit Co. v. Whitson* (1960) 187 Cal. App. 2d 751, 755, 10 Cal. Rptr. 6 ; *Pierce v. Wright* (1953) 117 Cal. App. 2d 718, 722-723, 256 P.2d 1049] .

A promise to answer for the obligations of another is deemed to be an original obligation of the promisor and need not be in writing in any of the following situations [*Civ. Code* § 2794]:

- The promise is made by the surety who has received property of another on an undertaking to apply it pursuant to that promise, or has received complete or partial discharge from an obligation in consideration of the promise.
- The creditor gives consideration or enters into an obligation in connection with the underlying obligation in terms or under circumstances that render the party promising to answer for the obligation of another the principal debtor, and the person in whose behalf it is made the surety.
- The creditor, on accepting the new promise of the surety, cancels an antecedent obligation of the principal; or the creditor releases the property of the debtor from a levy, or releases the debtor from imprisonment under an execution on a judgment obtained on the antecedent obligation.
- The surety makes its promise on any consideration beneficial to the promisor.
- A factor undertakes, for a commission, to sell merchandise and act as surety in connection with the

sale.

- The holder of an instrument for payment of money, to whom a third person is or may become liable, transfers it in payment of his or her own precedent debt, or for new consideration, and guarantees the instrument.

A person may become a surety without the knowledge or consent of the principal [*Civ. Code* § 2788].

An offer to become a surety may be accepted by acting on it, or by accepting other consideration, unless notice of acceptance is expressly required. A surety is bound without notice of acceptance if an absolute obligation is undertaken [*Civ. Code* § 2795].

Legal Topics:

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§ 79.14 Interpretation of Suretyship

It is implied that the surety will not assume greater liability under an obligation, arising from a contract the terms of which have not been formally agreed on, than under the most common terms in similar contracts at the place where the underlying obligation is to be performed [*Civ. Code § 2799*].

A guaranty to the effect that an obligation is good or collectible imports that the debtor is solvent and that the obligation is collectible by the usual legal proceedings taken with reasonable diligence [*Civ. Code § 2800*; see *Com. Code § 3419(d)*]. However, a guaranty as to collection is discharged without the creditor exercising reasonable diligence in its collection if no part of the debt could have been collected on the taking of legal action [*Civ. Code § 2801*].

Further, under a guaranty of collection, the principal debtor is considered insolvent, making the guarantor liable, when the principal debtor has left California and has no property in California from which the obligation might be satisfied [*Civ. Code § 2802*].

Legal Topics:

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

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§ 79.15 Liability Imposed by Law on Sureties

A suretyship obligation is deemed unconditional unless its terms contain some condition precedent to the liability of the surety [*Civ. Code § 2806*]. A surety who has assumed liability for payment or performance is liable to the creditor immediately on the default of the principal, and without demand or notice [*Civ. Code § 2807*; see *Com. Code § 3419(b)*]. A person who assumes liability as surety on a conditional obligation assumes liability commensurate with that of the principal, and is not entitled to notice of default of the principal unless the surety is unable, by exercise of reasonable diligence, to acquire information of the default, and the creditor has actual notice of the default [*Civ. Code § 2808*]. The obligation of the surety must not be larger or more burdensome than the obligation of the principal, and if it is, it must be reduced in proportion to the principal obligation [*Civ. Code § 2809*; see *Cates Construction, Inc. v. Talbot Partners* (1999) 21 Cal. 4th 28, 39-41, 86 Cal. Rptr. 2d 855, 980 P.2d 407 (performance bond and construction contract, construed together, permitted developer to recover delay damages from surety)].

A surety is liable on a suretyship agreement even if the principal has a defense of mere personal disability to the underlying obligation, but the surety is not liable if for any other reason the principal has a defense to the underlying obligation, either at the time of contracting the obligation or thereafter, unless the surety has assumed liability with knowledge of the existence of the defense. If the principal is not liable because of mere personal disability, recovery back by the creditor of any res that formed all or part of the consideration for the contract will have the effect on the liability of the surety which is attributed to the recovery back of the res under the law of sales generally [*Civ. Code § 2810*]. If a principal is required to give a bond, he or she may agree with the surety to deposit assets with a financial institution approved by the court. These assets may not be withdrawn without the written consent of the surety or a court order. Such an agreement must not release or change the liability of the principal or surety as established by the terms of the bond [*Civ. Code § 2811*].

A performance bond surety that takes over and completes a construction project for the insured contractor may be liable for liquidated damages provided for in the construction contract under certain circumstances. To determine whether the completing surety is liable for those liquidated damages, the courts will look to both the contract and the bond. Surety contracts are construed according to the rules governing all contracts [see *U.S. Leasing Corp. v. duPont* (1968) 69 Cal. 2d 275, 284, 70 Cal. Rptr. 393, 444 P.2d 65]. As a general rule, a contract performance bond will be read and

construed together with the construction contract because the surety necessarily contracts with reference to the construction contract as made and would not otherwise know what obligation it is assuming. This is particularly so when the bond expressly declares that the contract is made a part of the bond and the terms of the contract are incorporated into the bond [see *Cates Construction, Inc. v. Talbot Partners* (1999) 21 Cal. 4th 28, 40, 86 Cal. Rptr. 2d 855, 980 P.2d 407 ; *Pacific Employers Ins. Co. v. City of Berkeley* (1984) 158 Cal. App. 3d 145, 150, 204 Cal. Rptr. 387] .

Although it does not follow from the fact that a contract and bond are construed together that the bond *necessarily* guarantees performance of all covenants and agreements contained in the contract, when the bond expressly refers to the contract and incorporates it by reference, the surety is bound by the liquidated damages provision. This conclusion is supported not only by the express language of the bond and contract, but also in the public policy favoring liquidated damages provisions in public works contracts [see *Pacific Employers Ins. Co. v. City of Berkeley* (1984) 158 Cal. App. 3d 145, 151-153, 204 Cal. Rptr. 387] . With respect to the latter, the State Contract Act [see *Pub. Contract Code* § 10100 *et seq.*] requires state contracts to contain a provision for liquidated damages for delay [*Pub. Contract Code* § 10226], and local agencies may include such provisions in public project construction contracts [see *Gov. Code* § 53069.85].

Legal Topics:

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

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§ 79.16 Continuing Guaranty

A continuing guaranty is a form of suretyship [*see Civ. Code § 2787*]. It is a guaranty relating to future liability of the principal, under successive transactions, which either continue the liability or from time to time renew it after it has been satisfied [*Civ. Code § 2814; see, e.g., Central Building, LLC v. Cooper (2005) 127 Cal. App. 4th 1053, 1055, 26 Cal. Rptr. 3d 212* (in case in which principals of corporation executed personal guaranties of payment on corporation's commercial lease, guaranty agreements were held to be continuing guaranties of performance under lease that also applied to lease amendments)]. A continuing guaranty may be revoked at any time by the guarantor as to future transactions, unless there is a continuing consideration as to those future transactions that the guarantor does not renounce [*Civ. Code § 2815*].

A letter of credit is not a form of suretyship obligation [*Civ. Code § 2787; see Com. Code § 5102(a)(10)* ("letter of credit" defined)]. Generally, a surety's liability for an obligation is secondary to, and derivative of, the liability of the principal for that obligation. In contrast, the liability of the issuer of a letter of credit to the beneficiary is direct and independent of the underlying transaction between the beneficiary and the issuer's customer [*see Western Security Bank v. Superior Court (1997) 15 Cal. 4th 232, 246-247, 62 Cal. Rptr. 2d 243, 933 P.2d 507; see also Ch. 56, Letters of Credit and Electronic Fund Transfers*].

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§ 79.17 Exoneration of Sureties

A surety is exonerated (relieved of liability to the creditor-obligee), if, by any act of the creditor without the consent of the surety, either the original obligation of the principal is altered in any respect or the remedies or rights of the creditor against the principal are impaired or suspended [*Civ. Code § 2819*; see *R.P. Richards, Inc. v. Chartered Construction Corporation (2000) 83 Cal. App. 4th 146, 154-155, 99 Cal. Rptr. 2d 425* (subcontractor's negotiated release of general contractor from claim for payment under bonded obligation and acceptance of unbonded obligation under settlement agreement, without surety's consent, fully extinguished general's bonded obligation to subcontractor which constituted impairment of subcontractor's rights and remedies against surety; under *Civ. Code § 2819*, this had legal consequence of exonerating surety on bonded obligation)]. The surety is not exonerated to the extent he or she may be indemnified by the principal [*Civ. Code § 2819*; see *FM Conner v. Conner (1999) 76 Cal. App. 4th 646, 650-652, 90 Cal. Rptr. 2d 687* (nothing creditor did or failed to do in bankruptcy proceeding rose to level of prejudicing surety or exonerating it on guaranty)]. That a promise by a creditor is void or voidable does not prevent it from altering the obligation or impairing the remedy [*Civ. Code § 2820*]. Even if there is rescission of the altering or impairing agreement, the liability of a surety who has been exonerated by that agreement is not restored [*Civ. Code § 2821*].

If the creditor accepts anything in partial satisfaction of the obligation, the surety is relieved of liability only to the same extent as the principal, and the suretyship arrangement otherwise continues in effect. However, if the surety is liable on only a portion of the obligation, and the principal provides partial satisfaction of the obligation, the principal may designate the portion of the obligation that is to be satisfied [*Civ. Code § 2822(a)*]. In this context, an agreement by a creditor to accept from the principal debtor a sum that is less than the balance owed on the original obligation, without the prior consent of the surety and without any other change to the underlying agreement between the creditor and the principal debtor, does not exonerate the surety for the agreed-on lesser sum [*Civ. Code § 2822(b)*; see *Civ. Code § 2819* (section does not supersede requirement of *Civ. Code § 2822(b)*)].

A mere delay on the part of a creditor to proceed against the principal or to enforce any other remedy does not exonerate the surety [*Civ. Code § 2823*]. If a surety has been indemnified by the principal, it is liable to the creditor to the extent of the indemnity notwithstanding the fact that the underlying obligation may have been modified or the principal released [*Civ. Code §§ 2824, 2819*].

A surety is not exonerated by the discharge of the principal by operation of law, if there is no intervention or omission by the creditor [*Civ. Code* § 2825]. The running of the statute of limitations on a principal obligation does not exonerate the surety from liability. The running of the statute of limitations merely bars an action against the original debtor. It does not extinguish the obligation and therefore does not necessarily exonerate the surety from liability [*see Regents of the Univ. of Cal. v. Hartford Indemnity Co. (1978) 21 Cal. 3d 624, 635, 147 Cal. Rptr. 486, 581 P.2d 197*].

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§ 79.18 Rights of Sureties

A person who appears to be a principal on an obligation may show, without showing that the creditor accepted him or her as a surety, that he or she is in fact a surety, except as against persons who have acted on his or her apparent character as principal [*Civ. Code § 2832*; see *Mead v. Sanwa Bank California* (1998) 61 Cal. App. 4th 561, 571-572, 71 Cal. Rptr. 2d 625 (owners of property who executed deed of trust in favor of developer's construction lender sufficiently pleaded that they were sureties rather than principal obligors; bank's officer considered them third parties, construction loan agreement and note were signed by developer only, and deed of trust identified secured obligation as that of developer and provided that owners had no personal liability for debt); *Quality Wash Group V, Ltd. v. Hallak* (1996) 50 Cal. App. 4th 1687, 1701-1702, 58 Cal. Rptr. 2d 592 (while vendors were unable to assert surety status against original owner who acted on faith of vendors' apparent status as principal obligors under note, pursuant to *Civ. Code § 2832* they were entitled to assert surety status against purchaser who did not act on their apparent status as principals)]. The usual rules of contract interpretation are applied to suretyship arrangements. A surety for consideration is in the same position as a gratuitous surety, other than for the exceptions to the written suretyship contract requirement stated in *Civ. Code § 2794* (discussed in § 79.13) [*Civ. Code § 2837*].

Even if the creditor has recovered a judgment against the surety, the latter remains in the position of a surety, mainly for purposes of enforcing rights against the principal [*Civ. Code § 2838*]. A surety is exonerated by performing, or offering to perform, the principal obligation [*Civ. Code § 2839*]. A surety may require the creditor, subject to *Code of Civ. Proc. § 996.440* (when a bond is given in an action or proceeding), to proceed against the principal, or to pursue any other remedy in the creditor's power that the surety cannot pursue, and that would lighten the surety's burden. If the creditor neglects to do so, the surety is exonerated to the extent to which the surety is thereby prejudiced [*Civ. Code § 2845*]. A surety may compel the principal to perform the obligation when due [*Civ. Code § 2846*]. If a surety satisfies the principal underlying obligation or any part of it, he or she is entitled to reimbursement from the principal of the amount disbursed, including necessary costs and expenses [*Civ. Code § 2847*]. A surety entitled to reimbursement also can enforce every remedy that the creditor had against the principal and can require any co-sureties to contribute to the reimbursement, without regard to the order of time in which they became sureties [*Civ. Code § 2848*; see, e.g., *Jans v. Nelson* (2000) 83 Cal. App. 4th 848, 858-859, 100 Cal. Rptr. 2d 106 (when all limited partners executed guaranties of partnership debt and there was no other express agreement concerning rights of contribution, equity required

proportionate obligation for contribution to be based on ownership interest of various guarantors)]. A surety is entitled to the benefit of all security held for the performance of the principal obligation by the creditor or by a co-surety, whenever acquired and whether the surety was aware of the security or not [*Civ. Code* § 2849]. If both the surety and the principal have hypothecated property to secure the principal obligation, the surety is entitled to have the property of the principal first applied to the discharge of the obligation [*Civ. Code* § 2850].

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§ 79.19 Obligor's Rights Against Security Given to Surety

A creditor (obligee) is entitled to the benefit of all security given to the surety by the debtor (principal) to secure performance of the underlying obligation and the creditor, on the maturity of the obligation, may compel the application of that security to its satisfaction [*Civ. Code § 2854*]. An arbitration award rendered against a principal alone cannot be, be deemed to be, or be used as an award against the principal's surety [*Civ. Code § 2855*].

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§ 79.20 Guarantor's Waiver of Rights and Defenses

[1] Governing Law

The validity of a waiver executed by a guarantor on or after January 1, 1997 is governed by *Civ. Code § 2856* [*Civ. Code § 2856(f)*; see [2], below]. The validity of a waiver executed before 1997 is determined by the law in effect on the date the waiver was executed [*Civ. Code § 2856(f)*; see [3], below].

If the principal's obligation is unenforceable because of illegality, the guaranty too is unenforceable [*Wells v. Comstock* (1956) 46 Cal. 2d 528, 533, 297 P.2d 961] . Thus, for instance, insofar as a guaranteed debt for interest is unenforceable on the ground of usury, the guarantor's contract cannot be construed or enforced so as to waive the guarantor's right to raise that defense, since a promise to pay usurious interest is illegal and therefore cannot be enforced on any theory [*WRI Opportunity Loans II, LLC v. Cooper* (2007) 154 Cal. App. 4th 525, 542-544, 65 Cal. Rptr. 3d 205] . Any defense that rests on the rule against the enforcement of illegal transactions is founded on considerations of public policy that are independent of the statutes allowing a guarantor to waive certain defenses. In particular, an examination of statutory history discloses that the Legislature did not intend *Civ. Code § 2856(a)(1)* [see [2], below] to displace or modify that rule, insofar as it applies to the waiver of defenses by guarantors [*WRI Opportunity Loans II, LLC v. Cooper* (2007) 154 Cal. App. 4th 525, 545, 65 Cal. Rptr. 3d 205 (defense based on transactional illegality is not among those "defenses that are or may become available to the guarantor or other surety by reason of [*Civil Code*] Sections 2787 to 2855, inclusive," which *Civ. Code § 2856(a)(1)* allows guarantor to waive)].

[2] Waivers Executed on or After January 1, 1997

A guarantor, including a guarantor of an obligation secured by real property or an estate for years, may waive any of the following rights and defenses:

- Any rights of subrogation, reimbursement, indemnification, and contribution and any other rights and defenses available to the guarantor under *Civ. Code §§ 2787-2855* [*Civ. Code § 2856(a)(1)*].
- Any rights or defenses the guarantor may have to the guaranty obligation by reason of an election of

remedies by the creditor [*Civ. Code* § 2856(a)(2)].

- Any rights or defenses the guarantor may have because the principal's obligation is secured by real property or an estate for years, including those based, directly or indirectly, on *Code of Civ. Proc.* §§ 580a, 580b, 580d, and 726 [*Civ. Code* § 2856(a)(3)].

A contractual provision that expresses an intent to waive any or all of the rights described above is effective to waive those rights and defenses without regard to the inclusion of any particular waiver language in the contract or any references to statutory provisions or judicial decisions [*Civ. Code* § 2856(b); *but see* *Civ. Code* § 2856(c), (d) (statutory language effective as waiver of the rights and defenses described in *Civ. Code* § 2856(a)(2) and (3))].

These statutory provisions do not apply to a guaranty, or other type of suretyship obligation, made with respect to a loan secured by a deed of trust or a mortgage on a dwelling for not more than four families when the dwelling is occupied, entirely or in part, by the borrower and the loan was used to pay all or part of the purchase price of that dwelling [*Civ. Code* § 2856(e)]. For statutory language effective as a waiver of the rights and defenses described in *Civ. Code* § 2856(a)(2) and (3), see § 79.261.

[3] Waivers Executed From January 1, 1995, to January 1, 1997

A guarantor may waive the rights of subrogation and reimbursement, and any other rights and defenses available to the guarantor under *Civ. Code* §§ 2787-2855. This rule applies to any guarantor, including the guarantor of an obligation secured by real property or any interest in real property, and includes the right to waive (1) any defenses the guarantor may have to the guaranty obligation by reason of an election of remedies by the creditor, and (2) any rights or defenses the guarantor may have by reason of protection afforded to the principal with respect to the obligation guaranteed pursuant to antideficiency or other California laws limiting or discharging the principal's indebtedness including, without limitation, *Code Civ. Proc.* §§ 580a, 580b, 580d, and 726 [former *Civ. Code* § 2856(a)].

Any language that expressly sets forth a waiver of any or all of the suretyship rights or defenses described above is effective whether or not it contains references to statutory provisions or judicial decisions [former *Civ. Code* § 2856(b)]. This statutory provision was enacted specifically in response to case law holding to the contrary [see *Cathay Bank v. Lee* (1993) 14 Cal. App. 4th 1533, 18 Cal. Rptr. 2d 420, review denied, Bank v. Lee, 1993 Cal. LEXIS 3777; see also stats. 1994, ch. 1204]; it does not apply to a guaranty of a loan to an individual primarily for personal, family, or household purposes, secured by a deed of trust or mortgage on a dwelling for not more than four families when the dwelling is occupied, entirely or in part, by the borrower [former *Civ. Code* § 2856(c)].

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§ 79.21 Definitions of Indemnity and Insurance

Indemnity is a contract by which one party (the indemnitor) agrees to save another (the indemnitee) harmless from the legal consequences of the conduct of one of the parties or of some third person [*Civ. Code* § 2772]. Insurance is a contract whereby one (the insurer) undertakes to indemnify another (the insured) against loss, damage, or liability arising from a contingent or unknown event [*Ins. Code* §§ 22, 23]. The definitions of indemnity and insurance are similar but not synonymous. Insurance is considered a particular type of indemnity, because the word "indemnify" is used in the definition of insurance, which is usually looked on as the broader term. Certain contracts are better classified as insurance rather than contracts of indemnity because of the special rules and laws applicable to them.

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§ 79.22 Indemnification of Acts and Parties

An indemnity agreement against an unlawful act to be done subsequent to the agreement is void if at the time the act is done the actor knows it is unlawful [Civ. Code § 2773]. However, if a wrongful act has already been done at the time of entering into the indemnity agreement, the agreement is valid, even if the act was known to be wrongful, unless the act constituted a felony [Civ. Code § 2774].

The indemnification of a named person extends also to the acts, and their consequences, of that person's agents [Civ. Code § 2775]. More than one person may be indemnified by a single agreement if a contrary intention does not appear [Civ. Code § 2776]. An indemnitor is liable jointly and separately with the indemnitee to every person injured by any act indemnified against [Civ. Code § 2777].

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§ 79.23 Interpretation of Indemnity Agreement

Unless the contrary is stated in the indemnity contract, the following rules of interpretation are to be used [*Civ. Code § 2778*]:

- If the contract provides indemnity against "liability," either expressly or in other equivalent terms, the indemnitee is entitled to recover on becoming liable.
- If the contract indemnifies against "claims, demands, damages, or costs," either expressly or in other equivalent terms, the indemnitee is not entitled to recover without payment of those things.
- Indemnity contracts against claims, demands, or liability, expressly or in other equivalent terms, are considered to include the cost of defense incurred in good faith and in the exercise of reasonable discretion.
- On request of the indemnitee, the indemnitor must defend actions brought against the indemnitee, but the indemnitee may elect to conduct his or her own defense [*Civ. Code § 2778*, para. 4]. This rule describes the indemnitor's duty to defend, not the duty of indemnification. It requires the indemnitor to defend actions or proceedings brought against the indemnitee if the latter requests the defense. It also makes clear that the indemnitee has the right to conduct its own defense if it so chooses. Nothing in this rule obligates the indemnitee to tender defense to the indemnitor; and the election to conduct its own defense (for any reason) does not supplant the preceding rule [*see Civ. Code § 2778*, para. 3] that indemnification embraces the costs of the indemnitee's defense. Thus, this rule does not bear on the question of reimbursement of defense costs but only addresses the indemnitor's undertaking of the defense of an action against the indemnitee [*City of Watsonville v. Corrigan* (2007) 149 Cal. App. 4th 1542, 1549, 58 Cal. Rptr. 3d 458] .
- If the indemnitee requests the indemnitor to defend the action involved and the indemnitor fails to so defend, any good faith recovery against the indemnitee is conclusive as to the liability of the indemnitor.

- However, if the indemnitor has not been given reasonable notice of the action or proceeding or is not allowed to control its defense, a judgment against the indemnitee is only presumptive evidence as to the liability of the indemnitor.
- A stipulation that a judgment against the indemnitee will be conclusive on the liability of the indemnitor is not effective if the indemnitee had a good defense on the merits, which because of lack of ordinary care was not established in the action.

Civ. Code § 2778 sets forth rules that are as much a part of an indemnity agreement as the rules expressly stated in the agreement, unless a contrary intention appears. If the agreement indicates a contrary intention of the parties as to some point in contention, the interpretive rules in the statute are not controlling on that point. When indemnity language in an agreement is simple and does not state anything contrary to the statute, *Civ. Code § 2778* is applicable in its entirety [*City of Watsonville v. Corrigan* (2007) 149 Cal. App. 4th 1542, 1546-1548, 58 Cal. Rptr. 3d 458] .

Indemnity agreements are not construed like liability insurance policies. The liability insurer receives a premium for protecting its insured against damage or liability from generally defined risks. The insurer owes a broad duty to defend its insured after tender, even when there is only a potential for indemnity, and even where no damages are ultimately awarded in the underlying action. Unlike insurance policies, which are adhesion contracts, there is normally no reason to construe indemnity agreements against the drafter. Instead, parties to an indemnity contract have great freedom of action in allocating risk, subject to certain limitations of public policy (such as *Civ. Code § 2782*). Thus, whether one party is obligated to indemnify the other party depends on the intent expressed in their contract, supplemented by the interpretive rules set forth in *Civ. Code § 2782*, not on principles laid down in general insurance contexts [*City of Watsonville v. Corrigan* (2007) 149 Cal. App. 4th 1542, 1548-1549, 58 Cal. Rptr. 3d 458] .

If one person (indemnitor) on the request of another (indemnitee) agrees to answer in damages for any violation of a duty on the part of the latter, the person so agreeing is entitled to be reimbursed in the same manner as a surety for whatever he or she may pay [*Civ. Code § 2779*].

The rule of comparative negligence is imputed into an indemnity agreement entitling the indemnitee to the percentage of damages not caused by its own negligence [see *Rooney v. United States* (9th Cir. 1980) 634 F.2d 1238, 1245] .

When a nonindemnity contract (such as a construction contract, for example) does not contain a specific provision for attorney's fees but does contain an indemnity provision, normally the indemnity provision will not be construable as the effective equivalent of a provision for attorney's fees, and a party's effort to claim attorney's fees in an action on the contract, on the theory that the indemnity provision can be so construed, usually will not succeed [e.g., *Carr Bus. Enters., Inc. v. City of Chowchilla*, 166 Cal. App. 4th 14, 19-23, 82 Cal. Rptr. 3d 128 (2008)] .

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§ 79.24 Indemnity in Connection With Construction Contracts

Any agreement in connection with a construction contract (except contracts of insurance companies admitted to transact insurance in California) that purports to indemnify the indemnitee against liability for damages for death or bodily injury to persons, injury to property, design defects, or any other loss, damage, or expense arising either under the preceding categories or from the sole negligence or willful misconduct of the indemnitee or the indemnitee's agents, servants, or independent contractors who are directly responsible to the indemnitee, is against public policy, void, and unenforceable [*Civ. Code § 2782(a)*]. All agreements affecting any construction contract with a public agency that purport to impose on the contractor, or relieve the public agency from, liability for the active negligence of the public agency are void and unenforceable [*Civ. Code § 2782(b)*]. Further, all agreements affecting any residential construction contracts [*see Civ. Code § 895 et seq.*] (and contract amendments) entered into after January 1, 2009, that purport to insure or indemnify, including the cost to defend, the builder, the general contractor, or a contractor not affiliated with the builder, by a subcontractor against liability for claims of construction defects are unenforceable (1) to the extent the claims arise out of or relate to the negligence of the builder, the contractor, their agents or servants, or other independent contractors who are directly responsible to the builder, or (2) for defects in design furnished by those persons, or (3) to the extent the claims do not arise out of or relate to the scope of work in the written agreement between the parties [*Civ. Code § 2782(c)*; *see Civ. Code § 895 et seq.* (obligations of builder or subcontractor that remain unaffected), 910(a) (rights that remain unaffected); *Civ. Code § 911* (definitions)]. This requirement may not be waived or modified by contractual agreement, act, or omission of the parties [*Civ. Code § 2782(c)*].

If a builder or contractor tenders a written claim, or a portion of a claim to a subcontractor, the subcontractor is entitled to either defend the claim with counsel of its choice, or pay within 30 days of receipt of an invoice from the builder or general contractor, no more than a reasonable allocated share of the builder's or general contractor's defense fees and costs [*see Civ. Code § 2782(d)*]. If the subcontractor fails to timely and adequately perform either one of these obligations, the builder or general contractor has the right to pursue a claim against the subcontractor for resulting compensatory and consequential damages and reasonable attorney's fees [*see Civ. Code § 2782(e)*; *see also Civ. Code § 2782(f), (g)* (right to seek equitable indemnity)].

These rules, however, are subject to the following exceptions:

- *Civ. Code § 2782* does not void an indemnity agreement when the indemnitee is merely an accommodation party who, as an accommodation to the contractor, permits the latter to enter on the accommodating party's property for the purpose of performing a construction contract for others [*Civ. Code § 2782.1*].
- If the self-insured owner of a plant or facility has a net worth exceeding \$10 million and is audited annually, the owner may enter into a valid agreement to indemnify a professional engineer against liability exceeding \$250,000 for negligent inspection services to the plant or facility provided by the engineer or the engineer's agents or employees [*Civ. Code § 2782.2*].
- *Civ. Code § 2782* does not prevent a contractor and the owner or other party for whose account the construction contract is being performed from negotiating and expressly agreeing to any allocation, release, liquidation, exclusion, or limitation of liability for design defects or of the promisee to the promisor arising out of or relating to the construction contract [*Civ. Code § 2782.5*].
- An agreement to indemnify professional engineers or geologists (or their agents, contractors, subsidiaries, or employees) from liability in providing hazardous materials identification, evaluation, preliminary assessment, design, remediation services, or other specified services is not against public policy and is therefore permitted if statutory criteria are satisfied [*Civ. Code § 2782.6*; see *Health & Safety Code §§ 25322, 25323*; *40 C.F.R. § 300.1 et seq.* (other services covered)].
- *Civ. Code § 2782(c)*, relating to residential construction contracts, does not prohibit a subcontractor or builder from mutually agreeing to the timing or immediacy of the defense and provisions for reimbursement of defense fees and costs, provided the agreement, on final resolution of the claims, does not waive or modify the provisions of *Civ. Code § 2782(c)* [see *Civ. Code § 2782(d)*].
- *Civ. Code § 2782* does not prohibit parties from mutually agreeing to reasonable contractual provisions for damages if any party fails to perform its obligations to defend against construction defect claims or to pay a reasonable allocated share of defense fees, as specified in *Civ. Code § 2782* [*Civ. Code § 2782(e)*].
- *Civ. Code § 2782* does not prohibit parties from seeking equitable indemnity for any claim governed by that statute [*Civ. Code § 2782(f)*].
- *Civ. Code § 2782* does not limit, restrict, or prohibit a builder, general contractor, or subcontractor from seeking equitable indemnity against any supplier, design professional, or product manufacturer [*Civ. Code § 2782(g)*].

"Construction contracts" are broadly defined to include any type of agreement, written or oral, concerning construction, surveying, design specifications, alteration, or removal of any building, transportation facility or other structure or improvement to real or personal property and collateral acts and services reasonably related to those tasks. The definition includes, but is not limited to, the erection of all structures or performance of all work, the rental of all equipment, all incidental transportation, crane and rigging service, and other goods and services [*Civ. Code § 2783*].

A "construction defect," as used in *Civ. Code § 2782*, means a violation of the standards set forth in *Civ. Code §§ 896 and 897*, governing actionable defects in residential construction [*Civ. Code § 2782(h)*].

A "design defect," as used in *Civ. Code §§ 2782 and 2782.5*, is defined as a condition arising out of the design of a structure, its equipment or machinery or similar objects, movable or immovable, that makes those items, when

constructed substantially in accordance with the design, inherently unfit, either wholly or in part for their intended use or that impairs or renders the use of the structure, equipment, machinery, or property dangerous [*Civ. Code* § 2784].

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§ 79.25 Indemnity Agreements in Connection With Hauling, Trucking, or Cartage Contracts

All indemnity agreements affecting hauling, trucking, or cartage contracts are against public policy, void, and unenforceable if they purport to indemnify the indemnitee against liability for damages arising out of bodily injury or death to persons, damage to property, or any other damage or expense arising from these categories, that are caused by the sole negligence or willful misconduct of the indemnitee or agents, servants, or independent contractors directly responsible to the indemnitee, except when the agents, servants, or independent contractors are under the direct supervision and control of the indemnitor [*Civ. Code § 2784.5*]. However, insurance contracts issued by admitted insurers in California or effected by surplus line brokers licensed in California are excepted from the foregoing prohibition [*Civ. Code § 2784.5*].

Legal Topics:

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

Contracts LawContract Conditions & ProvisionsIndemnityContracts LawTypes of ContractsGeneral Overview



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§ 79.26 Relation of Suretyship to Indemnity

Suretyship is one type of indemnity agreement. Indemnity agreements can take two basic forms:

- A two-party arrangement between the parties to the underlying obligation under which the indemnitor agrees to hold the indemnitee harmless against loss or liability, including that caused by the indemnitor's own conduct, in connection with the underlying agreement; or
- A two- or three-party arrangement under which the indemnitor agrees to indemnify the indemnitee against loss or liability caused by conduct of the indemnitee or some third person, but not by conduct (other than fortuitous) of the indemnitor who is not a party to the underlying transaction.

A suretyship agreement falls into the second category. The surety (indemnitor) is not a party to the underlying agreement. The surety agrees to indemnify the obligee (indemnitee) for loss resulting from conduct of the principal (obligor).

The second category also includes the general field of insurance. The insurer (indemnitor) is not a party to the underlying agreement. The insurer agrees to indemnify the insured (indemnitee) against loss caused by the conduct of (1) the insured himself or herself (i.e., liability insurance); or (2) a third person (i.e., theft insurance; or, completing the circle, surety insurance when the obligee is considered insured and the loss is caused by the principal/obligor). The use of either suretyship or indemnity does not detract in any way from the basic legal obligations owed to, or rights of, the obligee or indemnitee. However, the effect of the obligor may be profoundly different, depending on whether the guaranty of a surety or the indemnification of an insurer is obtained. By law, and often by contract, the satisfaction of an obligation by a surety does not relieve the obligor from liability, but only transfers the obligation from the obligee to the surety because the obligor has a duty to indemnify the surety for the amount paid to the obligee [*Civ. Code* §§ 2779, 2847]. In the case of an indemnity agreement, the obligor can actually transfer liability to the indemnitor and, if the indemnitor is solvent and otherwise able to satisfy the obligation, the obligor owes no further duty to anyone [*Civ. Code* § 2772; *Great Western Furniture Co. v. Porter Corp.* (1965) 238 Cal. App. 2d 502, 516, 48 Cal. Rptr. 76]. Sureties are concerned with the obligor's financial condition and sometimes require collateral security. These factors are often

irrelevant to an indemnitor. The premium or other charge made will often reflect the surety's right to reimbursement (gratuitous guarantors are not unusual), but the fixed nature of a surety's obligation as compared to the normally contingent liability of an indemnitor based on conduct or an event that is not likely to happen, tends to make the relative risk and cost somewhat similar.

Legal Topics:

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

Civil Procedure Remedies Bonds Sureties General Overview Contracts Law Types of Contracts Guaranty Contracts



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§ 79.27 The Use of Suretyship/Guaranty Versus Indemnity

There is probably no lawful contract the performance of which cannot be guaranteed by a third-party surety. On the other hand, a party to an underlying contract can never guarantee its performance; this would add nothing to that party's original promise. However, a contracting party can agree to indemnify and hold the other party harmless from loss or liability that flows from the agreement and to obtain insurance when necessary to assure this result. When a party to a contract (or other person requiring protection) wants assurance that it will be performed by the other party, a surety's guaranty to that effect must be obtained. When a contracting party wants protection against a possible loss which is not coextensive with the basic underlying obligation of the other party, he or she can do the following:

- Have the other party, in effect, assume the risk by indemnification;
- Obtain insurance against the risk of loss; or
- Combine the two preceding options by requiring the indemnifying party to obtain and pay for satisfactory insurance.

When the underlying situation does not involve two or more parties, at least at the outset, the risk of loss can be protected against only by an otherwise uninvolved insurer.

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 79.28 Number of Agreements Involved

A suretyship or guaranty situation must involve at least two agreements, which may be included in one contract or writing. First, there is the agreement between the principal (obligor, debtor) and the obligee (creditor), called the underlying agreement or obligation, which causes the principal to owe a duty of performance to the obligee. Second, there is the agreement between the surety (and principal) and the obligee, called the suretyship or guaranty agreement, which guarantees the principal's performance or compensates for lack of it.

An indemnity or insurance situation may involve only one agreement, but there may be two or more agreements involved. If an indemnitor (insurer) has no connection to, and is not required by, the underlying transaction, or if there is no particular underlying transaction involved, there can be only one agreement between the indemnitor (insurer) and indemnitee (insured), commonly in the form of an insurance policy. However, if the indemnitor is also a party to an underlying agreement in connection with which the indemnity provision is written, or if the underlying agreement requires one of the parties to obtain insurance for the benefit of the other (to secure his or her promise of indemnity), then at least two obligatory agreements or provisions must be written.

Legal Topics:

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

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§ 79.29 Number of Parties Involved

A suretyship arrangement must have at least three parties. These parties are:

- The *obligor* or *principal*: the person obligated by the underlying agreement.
- The *creditor* or *obligee*: the person to whom the obligation of the underlying agreement flows.
- The *surety* or *guarantor*: the person guaranteeing performance of the obligation of the underlying agreement.

A person obligated by the underlying agreement cannot act as surety or guarantor of his or her own obligation. However, he or she can agree to indemnify for collateral loss caused by his or her failure to perform, or by defective performance of, the underlying agreement.

Often only two entities are parties to an indemnity agreement (other than when insurance is required as additional security). They are the same parties that have entered into the underlying agreement. However, it is not uncommon to have a third party, usually an insurance company, agree to indemnify the indemnitee for loss suffered as a result of the other party's conduct or that of a third person. That relationship is usually suretyship if the performance of the underlying obligation is being guaranteed; or one of the other forms of indemnity, often called insurance, if a different risk is being covered.

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§ 79.30 Determining Party to Be Protected

There is no universal rule specifying which party to an underlying transaction must provide additional protection in the form of suretyship or indemnity, or which party should receive the benefit of the protection. Many agreements and other transactions of a particular class, or in particular instances, are regularly entered into without either party providing additional protection. Sometimes both parties must provide for, and receive the benefit of, guaranties or indemnity.

Most situations can be explained on the basis of the following reasons for one (or more) of the parties to provide for suretyship or indemnity or to be protected thereby:

- A law requires a party to provide protection in order to legally enter into the contemplated transaction. Often a governmental agency is a party to these transactions, such as, for example:
 - The surety bonds required of certain licensees of the State of California in order to obtain and hold their licenses.
 - The requirement that employers provide worker's compensation insurance (insurance-type indemnity) for their employees.
 - If an employer qualifies as a self-insurer, the employer must agree to indemnify employees for work-connected injury or sickness and provide a surety bond to guarantee its performance (surety-type indemnity).
- The custom and normal business procedure involved with the type of transaction contemplated is that a party provide for suretyship or indemnity of his or her performance of, or conduct in connection with, the underlying agreement. Perhaps the best example is the contractor who provides various bonds in connection with a construction contract, notwithstanding the fact that the contractor may be a multimillion dollar concern and the owner of the property may have barely enough cash to make a down payment on the cost of construction. However, note that next reason listed below, in regard to financing,

may have application in conjunction with, or in fact be the cause of, this situation.

- Of all the reasons discussed in this text, none is more important or more encompassing than the general concept that the party in a position of economic dominance will be able to demand and receive relatively complete assurance of the performance of the underlying obligation or of proper conduct in connection with that performance.

- The type of performance or the order of performance provided by the underlying obligation are almost always key elements in determining if, and on whose part, suretyship or indemnity can be required. On the formation of a contract when one party has fully performed (unilateral contract), no guaranty of that party's performance is necessary or possible. On the other hand, it may still be very beneficial to have that party agree to indemnify for a possible liability that might result from his or her conduct. In bilateral contract situations it is possible for either or both of the parties to require surety or indemnity protection. When the performance required of a party is procedurally simple or lacking in collateral risk, as for example repaying a loan obligation, indemnity against conduct causing collateral loss is unnecessary, but a guaranty of a performance of the basic obligation is commonly obtained. When the performance of a party is to extend over a long period of time, as the repayment of a long-term indebtedness, or when it involves complicated, difficult, or dangerous duties, as constructing a building to specifications, a guaranty or surety bond for performance or indemnification against collateral loss is commonly required.

- Most situations will involve a combination of two or more of the foregoing reasons for employing suretyship or guaranty protection. Commercial transactions are often complicated, involving a number of parties with conflicting interests. Reasons for suretyship often reinforce each other. For example, a government, either by law or otherwise, is usually in a dominant position and customarily is the recipient of types of performance susceptible to guaranty when it enters into either contractual or governmental transactions. If both parties have conflicting grounds for added protection, and they are, economically and otherwise, fairly evenly matched, the result may be that both or neither of the parties receive protection. Counsel representing a client in contract negotiations should insist, if feasible, on at least equal treatment in regard to the protection offered by sureties and indemnitors.

Legal Topics:

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

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§ 79.31 Third-Party Indemnity Agreements

Surety companies, in addition to underwriting the qualifications of a prospective principal, obtaining collateral to secure the risk they are undertaking, and being indemnified by the principal, may require a third-party indemnity agreement to be executed. A third-party indemnity agreement, as that term is generally used, contains the promise of a friend, relative, or business associate of the principal to the effect that the surety will be indemnified as to any payment it is required to make under its surety agreement because of default of the principal. In effect, the indemnitor is guaranteeing that the principal will properly perform the underlying obligation and that if he or she does not, the indemnitor will compensate the surety for any loss resulting. In any situation when the bond of a corporate licensed surety company is required, the individual indemnitor could not directly act as surety in the matter, but can by the indemnification agreement support a principal who might not be fully qualified for bonding without the indemnification agreement by the third party. For forms for a third party indemnification agreement, see §§ 79.271 and 79.272.

Legal Topics:

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

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§ 79.32 Approval by Attorney General of Bonds Required by State Agencies

The Attorney General must approve the form of bonds required to be furnished to state agencies by licensees and other persons (other than public officers and employees) by the law of those agencies [*Gov. Code § 11110*]. The Attorney General may revoke or modify the approval previously given to bond forms [*Gov. Code § 11111*]. Approval, revocation, and modification may be made after consultation with interested persons and groups [*Gov. Code § 11113*]. Modifications of the approved bond forms are in fact frequently made, so that care should be taken to determine that the currently approved bond form is used. Currently approved bond forms are filed as regulations and are listed in Title 11 of the California Code of Regulations [*Gov. Code § 11112*].

Bonds approved by the Attorney General apply to virtually all regulated businesses in the state, and use of the required bond form is mandatory. Approved bond forms are listed in 11 Cal. Code Reg. § 25.1 et seq. Because of the number of different types of bond forms, Title 11 does not contain reproductions of individual forms. However, an example of a typical bond form is presented [*see 11 Cal. Code Reg. § 25*]. Copies of the required bond forms may be obtained from the department, board, bureau, commission, or agency that requires their use [*11 Cal. Code Reg. § 25*].

Legal Topics:

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

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[Reserved]

§§ 79.33[Reserved]



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§ 79.50 Nature and Application

The Bond and Undertaking Law [*Code Civ. Proc.* §§ 995.010-996.560] was enacted in 1982 to standardize the procedural rules governing California bonds and undertakings posted pursuant to statute. The law applies to any bond or undertaking executed, filed, posted, furnished, or otherwise given as security pursuant to any California statute, except when the statute prescribes a different rule or is inconsistent [*Code Civ. Proc.* § 995.020(a)]. It applies to any such bond or undertaking given on or after January 1, 1983. It also applies to a bond or undertaking given before January 1, 1983 if another surety is substituted for the original surety on or after January 1, 1983, or if the principal gives a new, additional, or supplemental bond or undertaking on or after January 1, 1983 [*Code Civ. Proc.* § 995.020(b)(1), (2)].

The Bond and Undertaking Law does not apply to a bail bond or an undertaking of bail [*Code Civ. Proc.* § 995.020(c)].

Legal Topics:

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§ 79.51 Definitions

[1] Admitted Surety Insurer

The Bond and Undertaking Law defines "admitted surety insurer" as a corporate insurer or a reciprocal or interinsurance exchange to which the Insurance Commissioner has issued a certificate of authority to transact surety insurance in California [*Code Civ. Proc. § 995.120(a)*; *see Ins. Code § 105*]. "Authorized surety company," "bonding company," "corporate surety," and comparable phrases in any California statute authorizing a bond are synonymous with "admitted surety insurer" [*Code Civ. Proc. § 995.120(b)*].

[2] Beneficiary

"Beneficiary" is defined as a person for whose benefit a bond is given, whether executed to, in favor of, in the name of, or payable to the person as an obligee [*Code Civ. Proc. § 995.130(a)*]. If a bond is for the benefit of the State of California or its people, the beneficiary is the court, officer, or other person required to determine the sufficiency of the sureties or to approve the bond [*Code Civ. Proc. § 995.130(b)*]. "Beneficiary," "obligee," and comparable terms used in any statute providing for a bond are synonymous with "beneficiary" for purposes of the Bond and Undertaking Law [*Code Civ. Proc. § 995.130(c)*].

If the statute providing for a bond does not specify the beneficiary of the bond, the bond will be to the State of California [*Code Civ. Proc. § 995.830*]. Unless otherwise provided by statute, a bond given by an officer of the court for the faithful discharge of the officer's duties and obedience to the orders of the court will be to the State of California [*Code Civ. Proc. § 995.820*].

[3] Bond

"Bond" includes both of the following [*Code Civ. Proc. § 995.140(a)*]:

- A surety, indemnity, fiduciary, or like bond executed by both principal and sureties; and

- A surety, indemnity, fiduciary, or like undertaking executed by the sureties alone.

A bond provided for or given "in an action or proceeding" does not include a bond provided for, or given as, a condition of a license or permit [*Code Civ. Proc. § 995.140(b)*]. This chapter does not discuss bonds given in actions or proceedings.

[4] Officer

"Officer" is defined as the sheriff, marshal, clerk of court, judge or magistrate (if there is no clerk), board, commission, department, or other public official or entity to whom the bond is given, or with whom a copy of the bond is filed, or who is required to determine the sufficiency of the sureties or to approve the bond [*Code Civ. Proc. § 995.160*].

"Statute" includes administrative regulation promulgated pursuant to statute [*Code Civ. Proc. § 995.180*].

[5] Principal

A "principal" is defined as the person who gives a bond [*Code Civ. Proc. § 995.170(a)*]. "Obligor," "principal," and comparable terms used in any California statute authorizing a bond mean "principal" for purposes of the Bond and Undertaking Law [*Code Civ. Proc. § 995.170(b)*].

[6] Surety

A "surety" is one who promises to answer for the debt, default, or miscarriage of another, or hypothecates property as security therefor [*Code Civ. Proc. § 995.185(a)*; *Civ. Code § 2787*]. "Surety" includes both personal surety and admitted surety insurer [*Code Civ. Proc. § 995.185(a)*]. The terms "bail," "guarantor," "bondsman," "surety," and comparable terms used in any California statute authorizing a bond mean "surety" for purposes of the Bond and Undertaking Law [*Code Civ. Proc. § 995.185(b)*].

[7] Undertaking

"Undertaking" is defined as a surety, indemnity, fiduciary, or like undertaking executed by the sureties alone [*Code Civ. Proc. § 995.190*].

Legal Topics:

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§ 79.52 Use of Bonds and Undertakings in Lieu of One Another

Unless the provisions or context requires otherwise, if a statute provides for a bond, an undertaking that otherwise satisfies the requirements for the bond may be given in its place with the same effect as if a bond were given, and references in the statute to the bond will be deemed to be references to the undertaking [*Code Civ. Proc. § 995.210(a)*]. Likewise, if a statute provides for an undertaking, a bond that otherwise satisfies the requirements for the undertaking may be given in its place with the same effect as if an undertaking were given, and references in the statute to the undertaking will be deemed to be references to the bond [*Code Civ. Proc. § 995.210(b)*].

Legal Topics:

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§ 79.53 Contents and Execution

A bond must be in writing, signed by the sureties under oath, and must include the following [*Code Civ. Proc.* § 995.320(a)]:

- A statement that the sureties are jointly and severally liable on the obligations of the statute providing for the bond.
- The address at which the principal and sureties may be served with notices, papers, and other documents required by the Bond and Undertaking Law.
- If the amount of the bond is based on the value of property or an interest in property, a description of the property or interest and the principal's estimate of the value of the property or interest, or, if given pursuant to the estimate of the beneficiary or court, the value as so estimated.

Unless the statute providing for the bond requires execution by an admitted surety insurer, a bond must be executed either by two or more sufficient personal sureties, or one sufficient admitted surety insurer, or any combination of sufficient personal sureties and admitted surety insurers [*Code Civ. Proc.* § 995.310].

At the time a bond is given, the principal serves a copy of the bond on the beneficiary. An affidavit of service must be given and filed with the bond [*Code Civ. Proc.* § 995.370].

A bond is not void so as to release the principal and sureties from liability because it does not contain the substantial matter or conditions required by the Bond and Undertaking Law or by the statute providing for the bond, or because there are any defects in its giving or filing [*Code Civ. Proc.* § 995.380(a)]. The beneficiary, in proceedings to enforce liability on the bond, may suggest the defect in it, or its giving or filing, and enforce the liability against the principal and the persons who intended to become and were included as sureties on the bond [*Code Civ. Proc.* § 995.380(b)].

Legal Topics:

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

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§ 79.54 Approval

A bond becomes effective without approval unless the statute providing for the bond requires that it be approved by the court or officer [*Code Civ. Proc. § 995.410(a)*]. If the statute providing for the bond requires that the bond be approved, the court or officer may approve or disapprove the bond on the basis of the affidavit or certificate of the sureties, or may require the attendance of witnesses and production of evidence and may examine the sureties under oath regarding their qualifications [*Code Civ. Proc. § 995.410(b)*]. The Bond and Undertaking Law does not preclude approval of a bond in an amount greater than that required by statute [*Code Civ. Proc. § 995.410(c)*].

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§ 79.55 Effect and Duration of Bond

A bond is effective when it is given or, if the statute providing for the bond requires that it be approved, when it is approved, unless the statute provides that the bond becomes effective at a different time [*Code Civ. Proc. § 995.420(a)*]. If the bond is to become effective other than when it is given or approved, it is effective at the time provided unless an objection to the bond is made before that time, in which case it becomes effective when the court makes an order determining the sufficiency of the bond [*Code Civ. Proc. § 995.420(b)*].

A bond remains in force and effect until the earliest of the following events:

- The sureties withdraw from or cancel the bond or a new bond is given in place of the original [*Code Civ. Proc. § 995.430(a)*].
- The purpose for which the bond was given is satisfied or the purpose is abandoned without any liability having been incurred [*Code Civ. Proc. § 995.430(b)*].
- A judgment of liability on the bond that exhausts the amount of the bond is satisfied [*Code Civ. Proc. § 995.430(c)*].
- The term of the bond expires. Unless the statute providing for the bond prescribes a fixed term, the bond is continuous [*Code Civ. Proc. § 995.430(d)*].

A bond given as a condition of a license or permit must be continuous in form, remain in full force and effect, and run concurrently with the license or permit period and any and all renewals, or until cancellation or withdrawal of the surety from the bond [*Code Civ. Proc. § 995.440*].

Legal Topics:

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§ 79.56 Personal Sureties

[1] Qualifications

A personal surety on a bond is sufficient if all of the following conditions are satisfied:

- The surety is a person other than the principal, and is not an officer of the court or member of the State Bar [*Code Civ. Proc. § 995.510(a)(1)*].
- The surety is a resident and either an owner of real property or a householder within California [*Code Civ. Proc. § 995.510(a)(2)*].
- The surety is worth the amount of the bond in real or personal property, or both, situated in California, over and above all debts and liabilities, exclusive of property exempt from enforcement of a money judgment [*Code Civ. Proc. § 995.510(a)(3)*].

If the amount of a bond exceeds \$10,000 and is executed by more than two personal sureties, the worth of a personal surety may be less than the amount of the bond if the aggregate worth of all sureties executing the bond is twice the amount of the bond [*Code Civ. Proc. § 995.510(b)*].

[2] Affidavits

A bond executed by personal sureties must be accompanied by an affidavit of qualifications of each surety [*Code Civ. Proc. § 995.520(a)*]. The affidavit must contain all of the following information:

- The name, occupation, residence address, and business address (if any) of the surety [*Code Civ. Proc. § 995.520(b)(1)*].
- A statement that the surety is a resident, and either an owner of real property or householder, within California [*Code Civ. Proc. § 995.520(b)(2)*].

- A statement that the surety is worth the amount of the bond in real or personal property, or both, situated in California, over and above all debts and liabilities, exclusive of property exempt from enforcement of a money judgment [*Code Civ. Proc.* § 995.520(b)(3)].

If the amount of the bond exceeds \$5,000, the affidavit must contain, in addition to the above information, all of the following information:

- A description sufficient for identification of real and personal property of the surety situated in California and the nature of the surety's interest therein that qualifies the surety on the bond [*Code Civ. Proc.* § 995.520(c)(1)].
- The surety's best estimate of the fair market value of each item of property [*Code Civ. Proc.* § 995.520(c)(2)].
- A statement of any charge or lien and its amount, known to the surety, whether of public record or not, against any item of property [*Code Civ. Proc.* § 995.520(c)(3)].
- Any other impediment or cloud known to the surety on the free right of possession, use, benefit, or enjoyment of the property [*Code Civ. Proc.* § 995.520(c)(4)].

If the amount of the bond exceeds \$10,000 and is executed by more than two personal sureties, the affidavit may state that the surety is worth less than the amount of the bond and the bond may stipulate that the liability of the surety is limited to the worth of the surety stated in the affidavit, as long as the aggregate worth of all sureties executing the bond is twice the amount of the bond [*Code Civ. Proc.* § 995.520(d)].

Legal Topics:

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

Civil Procedure Remedies Bonds Sureties General Overview Civil Procedure Remedies Bonds Sureties Procedures



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27-79 California Legal Forms--Transaction Guide § 79.57

§ 79.57 Admitted Surety Insurers

[1] Acceptance and Approval of Surety on Bond

If a statute provides for a bond with any number of sureties, one sufficient admitted surety insurer [*see Code Civ. Proc. § 995.120; see also § 79.51[1]* (definition)] may become and must be accepted as sole surety on the bond [*Code Civ. Proc. § 995.610(a)*]. The admitted surety insurer is subject to all the liabilities and entitled to all the rights of personal sureties [*Code Civ. Proc. § 995.610(b)*]. Two or more admitted surety insurers may be sureties on a bond by executing the same or separate bonds for amounts aggregating the required amount of the bond. Each admitted surety insurer is jointly and severally liable to the extent of the amount of the liability assumed by it [*Code Civ. Proc. § 995.620*].

An admitted surety insurer must be accepted or approved by a court or officer as surety on a bond without further acknowledgment if the bond is executed in the name of the surety insurer under penalty of perjury, or if the fact of execution of the bond is acknowledged before an officer authorized to take and certify acknowledgments [*Code Civ. Proc. § 995.630*]. In addition, one of the following conditions, at the option of the surety insurer, must be satisfied:

- A copy of the transcript or record of the unrevoked appointment, power of attorney, bylaws, or other instrument, certified by the proper authority and attested by the seal of the insurer entitling or authorizing the person who executed the bond to do so for and in behalf of the insurer, is filed with the clerk of the county in which the court or officer is located [*Code Civ. Proc. § 995.630(a)*].
- A copy of a power of attorney is attached to the bond [*Code Civ. Proc. § 995.630(b)*].

On review of the Department of Insurance's Internet website, the county clerk, on request, must issue a certificate stating whether a surety is admitted or if the certificate of authority of an admitted surety insurer has been surrendered, revoked, canceled, annulled, or suspended, and, in the event that it has, whether renewed authority has been granted [*Code Civ. Proc. § 995.640(a)*]. On review of the Department of Insurance's Internet website, the county clerk, on request, also must issue a certificate stating whether a copy of the transcript or record of the unrevoked appointment, power of attorney, bylaws, or other instrument, certified by the proper authority and attested by the seal of an admitted

surety insurer, authorizing the person who executed a bond to do so for and on behalf of the insurer, is filed in the clerk's office [*Code Civ. Proc.* § 995.640(b)].

[2] Objection to Sufficiency

Any person objecting to the sufficiency of an admitted surety insurer must attach to and incorporate in the objection either (or both) (1) the certificate of the county clerk of the county in which the court is located, stating that the insurer has not been certified to the county clerk by the Insurance Commissioner as an admitted surety insurer or that the certificate of authority of the insurer has been surrendered, revoked, canceled, annulled, or suspended and has not been renewed; or (2) an affidavit stating facts that establish the insufficiency of the insurer [*Code Civ. Proc.* § 995.650(a), (b)].

If an objection is made to the sufficiency of an admitted surety insurer on a bond, or if the bond is required to be approved, the insurer must submit the following documents to the court or officer:

- The original or certified copy of the unrevoked appointment, power of attorney, bylaws, or other instrument entitling or authorizing the person who executed the bond to do so, within 10 calendar days of the insurer's receipt of a request to submit that instrument [*Code Civ. Proc.* § 995.660(a)(1)].
- A certified copy of the certificate of authority of the insurer issued by the Insurance Commissioner, within 10 calendar days of the insurer's receipt of a request to submit the copy [*Code Civ. Proc.* § 995.660(a)(2)].
- A certificate from the clerk of the county in which the court or officer is located that the certificate of authority of the insurer has not been surrendered, revoked, canceled, annulled, or suspended; or, if it has, that renewed authority has been granted, within 10 calendar days of the insurer's receipt of the certificate [*Code Civ. Proc.* § 995.660(a)(3)].
- Copies of the insurer's most recent annual statement and quarterly statement filed with the Department of Insurance pursuant to *Ins. Code* § 900 *et seq.*, within 10 calendar days of the insurer's receipt of a request to submit the statements [*Code Civ. Proc.* § 995.660(a)(4)].

If the admitted surety insurer complies with the requirements of *Code Civ. Proc.* § 995.660(a), and if it appears that (1) the bond was duly executed, (2) the insurer is authorized to transact surety insurance in California, and (3) the insurer's assets exceed its liabilities in an amount equal to or exceeding the amount of the bond, then the insurer is sufficient and must be accepted or approved as surety on the bond, subject to *Ins. Code* § 12090, discussed in [3], below [*Code Civ. Proc.* § 995.660(b)].

With respect to a bond given in favor of a public agency, if an objection is made to the sufficiency of an admitted surety insurer on that bond, or if that bond is required to be approved, the public agency may not require the admitted surety insurer to comply with any bond requirements other than those in *Code Civ. Proc.* § 995.660 [*Code Civ. Proc.* § 995.670(a); see *Code Civ. Proc.* § 995.670(b) ("public agency" defined)].

[3] Limitation on Admitted Insurer's Aggregate Liability

An admitted surety must not become a surety or accept reinsurance on any one undertaking when its liability on that undertaking in excess of the amount reinsured by it in an admitted insurer amounts to more than 10 percent of its capital and surplus as shown by its last filed statement [*Ins. Code* § 12090(a)]. In determining its liability on an undertaking, an admitted insurer may reduce its liability by either or both of the following [*Ins. Code* § 12090(b)]:

- Depositing with the surety insurer, in a manner acceptable to the Insurance Commissioner, or by conveyance of assets that would qualify as admitted assets to it in trust for its protection.
- Providing a clean and irrevocable letter of credit acceptable to the Insurance Commissioner.

Legal Topics:

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

Civil Procedure Remedies Bonds Sureties General Overview Civil Procedure Remedies Bonds Sureties Procedures



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27-79 California Legal Forms--Transaction Guide § 79.58

§ 79.58 Deposit in Lieu of Bond

[1] Requirements for Deposit

With the exception of deposits with the Secretary of State [see § 79.59], or when the statute providing for a bond precludes a deposit in lieu of bond or limits the form of deposit, the principal, instead of giving a bond, may deposit with the officer any of the following [*Code Civ. Proc.* § 995.710(a)]:

- Lawful money of the United States. The money must be maintained by the officer in an interest-bearing trust account.
- Bearer bonds or bearer notes of the United States or the State of California.
- Certificates of deposit payable to the officer, not exceeding the federally insured amount, issued by federally insured banks or savings associations authorized to do business in California and insured by the Federal Deposit Insurance Corporation.
- Savings accounts assigned to the officer, not exceeding the federally insured amount, together with evidence of the deposit in the savings accounts with federally insured banks authorized to do business in California and insured by the Federal Deposit Insurance Corporation.
- Investment certificates or share accounts assigned to the officer, not exceeding the federally insured amount, issued by federally insured savings associations authorized to do business in California and insured by the Federal Deposit Insurance Corporation.
- Certificates for funds or share accounts assigned to the officer, not exceeding the guaranteed amount, issued by a credit union [see *Fin. Code* § 14002] whose share deposits are guaranteed by the National Credit Union Administration or any other agency approved by the Department of Financial Institutions.

The deposit must be in an amount or have a face value, or in the case of bearer bonds or bearer notes have a market value, equal to or in excess of the amount that would be required to be secured by the bond if the bond were given by an admitted surety insurer. An officer in his or her discretion in the case of bearer bonds or bearer notes other than in an action or proceeding may require that the amount of the deposit be determined not by the market value of the bonds or notes but by a formula based on the principal amount of the bonds or notes [Code Civ. Proc. § 995.710(b)]. In addition, the deposit must be accompanied by an agreement executed by the principal authorizing the officer to collect, sell, or otherwise apply the deposit to enforce the liability of the principal on the deposit. The agreement must include the address at which the principal may be served with any documents relating to the Bond and Undertaking Law [Code Civ. Proc. § 995.710(c)]. The officer may prescribe terms and conditions to implement the foregoing [Code Civ. Proc. § 995.710(d)]. The principal and beneficiary must stipulate as to the market value of bearer bonds or bearer notes [see Code Civ. Proc. § 995.720(a)].

A deposit given instead of a bond has the same force and effect as a bond, is treated the same as a bond, and is subject to the same conditions, liability, and statutory provisions, including provisions for increase and decrease of amount [Code Civ. Proc. § 995.730].

[2] Payment of Interest to Principal

If no proceedings are pending to enforce the liability of the principal on the deposit, the officer must pay quarterly, on demand, any interest on the deposit, when earned in accordance with the terms of the account or certificate, and deliver to the principal, on demand, any interest coupons attached to bearer bonds or bearer notes as the interest coupons become due and payable, or pay annually any interest payable on the bonds or notes [Code Civ. Proc. § 995.740(a), (b)].

[3] Use of Deposit to Satisfy Principal's Liability

The principal must pay the amount of any liability on the deposit within 30 days after the date on which the judgment of liability becomes final [Code Civ. Proc. § 995.750(a)]. If the principal does not pay the amount of the liability on the deposit within that time, the deposit is collected, sold, or otherwise applied to the liability on order of the court that entered the judgment of liability, made on five days notice to the parties [Code Civ. Proc. § 995.760(a); see Code Civ. Proc. § 995.760(b) (sale of bonds)]. The deposit is distributed first to pay the cost of collection, sale, or other application of the deposit, and then to pay the judgment of liability of the principal on the deposit. The remainder, if any, is returned to the principal [Code Civ. Proc. § 995.760(c)].

[4] Return of Deposit

A deposit is returned to the principal at the time specified by the applicable statute or on substitution of a sufficient bond for the deposit, whichever is earlier [see Code Civ. Proc. § 995.770(a), (c)]. If a bond is substituted, it is in full force and effect for all liabilities incurred, and for acts, omissions, or causes existing or which arose, during the period the deposit was in effect [Code Civ. Proc. § 995.770(a)].

Legal Topics:

For related research and practice materials, see the following legal topics:
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§ 79.59 Deposits With Secretary of State

After January 1, 1999, a deposit may not be used in lieu of a bond for deposits made with the Secretary of State [*Code Civ. Proc. § 995.710(e)*]. Any principal who made a deposit with the Secretary of State pursuant to *Code Civ. Proc. § 995.710* prior to that date may continue to utilize that deposit in lieu of a bond in accordance with *Code Civ. Proc. § 995.710* and the statute that prescribes a bond. However, the deposit will not be renewable [*Code Civ. Proc. § 995.710(e)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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27-79 California Legal Forms--Transaction Guide § 79.60

§ 79.60 Insufficient and Excessive Bonds

If there is evidence that the bond is insufficient, the officer may order the principal to appear and show cause why the bond should not be determined insufficient. The order must name a day not less than three or more than 10 days after service [see *Code Civ. Proc. § 996.020(a)*]. If the principal fails to appear or show good cause, the officer may determine that the bond is insufficient and order a new, additional, or supplemental bond to be given [*Code Civ. Proc. § 996.020(b)*]. If a sufficient bond is not given within 10 days after the order, the officer must issue an order vacating the rights obtained by giving the original bond. These rights may not be reinstated until a new, additional, or supplemental bond is given [*Code Civ. Proc. § 996.020(c)*; see § 79.61].

The officer may also determine that the amount of the bond is excessive and order it to be reduced to an amount that in the discretion of the officer appears proper under the circumstances. The order is subject to any limitations in the statute providing for the bond [*Code Civ. Proc. § 996.030(a)*]. Determinations are made on motion or affidavit of the principal in the same manner as, and under the same procedures as, a determination that a bond is insufficient, except that the motion or order to show cause is served on the beneficiary [*Code Civ. Proc. § 996.030(b)*]. The principal may give a new bond for the reduced amount and the sureties may be the same sureties as on the original bond [*Code Civ. Proc. § 996.030(c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
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27-79 California Legal Forms--Transaction Guide § 79.61

§ 79.61 New, Additional, and Supplemental Bonds

If the court or officer so orders, the principal must give a new, additional, or supplemental bond [*Code Civ. Proc. § 996.210(a)*]. The principal may give a new bond if a surety withdraws from or cancels the original bond or to obtain the release of sureties from liability on the original bond [*Code Civ. Proc. § 996.210(b)*]. A new, additional, or supplemental bond is subject to all the provisions applicable to the original bond and to the Bond and Undertaking Law [*Code Civ. Proc. § 996.230*].

A new, additional, or supplemental bond must be in the same form and have the same obligation as the original bond, must be in all other respects the same as the original bond, and must be in an amount sufficient for its purpose [*Code Civ. Proc. § 996.220(a)*]. A supplemental bond, in addition to any other requirements, must state the names of the remaining original sureties, the name of the new surety, and the amount for which the new surety is liable. The supplemental bond should be for the amount for which the original surety was liable on the original bond [*Code Civ. Proc. § 996.220(b)*].

If a new bond is given in place of the original bond, the original bond remains in effect for all liabilities incurred before, and for acts, omissions, or causes existing or which arose before the new bond became effective [*Code Civ. Proc. § 996.240(a)*]. The sureties on the original bond are not liable for any act, default, or misconduct of the principal or other breach of condition of the bond that occurs after, or for any liabilities that arise after, the new bond becomes effective [*Code Civ. Proc. § 996.240(b)*].

An additional or supplemental bond does not discharge or affect the original bond, which remains in full force and effect [*Code Civ. Proc. § 996.250(a)*]. After an additional or supplemental bond is given, the principal and sureties are liable on either or both bonds for injury caused by breach of any condition of the bonds. The beneficiary may enforce the liability on either bond, or may enforce the liability separately on both bonds and recover separate judgments on both, but may not actually collect a double recovery [*Code Civ. Proc. § 996.250(b), (c)*].

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil Procedure Remedies Bonds Sureties Liability



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§ 79.62 Cancellation of Bond or Withdrawal of Sureties

A surety may cancel or withdraw from a bond by giving a notice of cancellation or withdrawal to the officer to whom the bond was given in the same manner as the bond was given. At the same time, the surety must mail or deliver a copy of the notice of cancellation or withdrawal to the principal [*Code Civ. Proc.* § 996.320]. Cancellation or withdrawal of a surety is effective at the earliest of the following [*Code Civ. Proc.* § 996.330]:

- 30 days after notice of cancellation or withdrawal is given.
- If a new surety is substituted for the original surety, the date the substitution becomes effective.
- If a new bond is given, the date the new bond becomes effective.

If the principal does not give a new bond within 30 days after notice of cancellation or withdrawal is given, all rights obtained by giving the original bond immediately cease, any office for which the bond is given is vacant, any commission for which the bond is given is revoked, and any license for which the bond is given is suspended [*Code Civ. Proc.* § 996.340(a)]. A person whose license or registration is suspended may not operate or carry on business pursuant to the license during the period of suspension. A license or registration that is suspended may be revived only by the giving of a new bond during the license or registration period in which the cancellation or withdrawal occurred [*Code Civ. Proc.* § 996.340(b)]. If withdrawal of a surety does not reduce the amount of the bond or the number of sureties below the minimum required by the statute providing for the bond, no new bond is required or necessary to maintain the original bond in effect [*Code Civ. Proc.* § 996.350]. If a surety cancels or withdraws from a bond, the bond remains in effect for all liabilities incurred before, and for acts, omissions, or causes existing or which arose before the cancellation or withdrawal [*Code Civ. Proc.* § 996.360(a)]. The surety is not liable for any breach of condition of the bond that occurs, or for any liabilities on the bond that arise, after the cancellation or withdrawal [*Code Civ. Proc.* § 996.360(b)]. The cancellation or withdrawal does not affect the bond as to the remaining sureties [*Code Civ. Proc.* § 996.360(c)].

Legal Topics:

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

Civil Procedure Remedies Bonds Sureties General Overview Civil Procedure Remedies Bonds Sureties Procedures



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§ 79.63 Liability of Principal and Sureties

The beneficiary may enforce the liability on a bond against both the principal and sureties [*Code Civ. Proc. § 996.410(a)*]. If the beneficiary is a class of persons, any person in the class may enforce the liability on a bond in the person's own name, without assignment of the bond [*Code Civ. Proc. § 996.410(b)*]. The sureties signing the bond are jointly and severally liable on the obligations of the bond, all provisions of the Bond and Undertaking Law, and the statute providing for the bond [*Code Civ. Proc. § 995.320(b)*].

The liability on a bond may be enforced by civil action in which both the principal and sureties must be joined as parties [*Code Civ. Proc. § 996.430(a)*]. A judgment of liability on a bond will be in favor of the beneficiary and against the principal and sureties, and will obligate each of them jointly and severally [*Code Civ. Proc. § 996.460(a)*]. A judgment of liability on a bond may be enforced in the same manner and to the same extent as other money judgments [*Code Civ. Proc. § 996.495*]. A judgment that does not exhaust the full amount of the bond decreases its amount but does not discharge the bond. The liability on the bond may be enforced thereafter from time to time until its amount is exhausted [*Code Civ. Proc. § 996.460(c)*]. The judgment may be enforced by the beneficiary directly against the sureties. However, this does not negate any right of subrogation of a surety against the principal or any right of a surety to compel the principal to satisfy the judgment [*Code Civ. Proc. § 996.460(d)*].

The aggregate liability of a surety to all persons for all breaches of the condition of a bond is limited to the amount of the bond [*Code Civ. Proc. § 996.470(a)*]. If a bond is given in an amount greater than the amount required by statute or by order of the court or officer pursuant to statute, the liability of the surety on the bond is limited to the amount required [*Code Civ. Proc. § 996.470(b)*].

The liability of a surety is limited to the amount stipulated if the bond contains a stipulation that the liability of a personal surety is limited to the worth of the surety [*see Code Civ. Proc. § 995.520* (affidavit of qualifications)] or a stipulation that the liability of a surety is an amount less than the amount of the bond pursuant to a statute that provides that the liability of sureties in the aggregate need not exceed the amount of the bond [*Code Civ. Proc. § 996.470(c)*].

Payment by a surety of the amount of a bond discharges the surety from all further liability on the bond [*Code Civ.*

Proc. § 996.490(a)]. Each surety is liable for contribution to cosureties who have made payment in proportion to the amount for which each surety is liable [*Code Civ. Proc. § 996.490(b)*].

Legal Topics:

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

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§ 79.64 Enforcing Liability on Bond for Benefit of State

The liability on a bond to the State of California may be enforced by or for the benefit of, and in the name of, any and all persons for whose benefit the bond is given who are damaged by breach of the condition of the bond [*Code Civ. Proc. § 995.850(a)*]. These persons, in addition to any other remedy they have, may enforce the liability on the bond in their own name, without assignment of the bond [*Code Civ. Proc. § 995.850(b)*; see *Code Civ. Proc. § 996.520* (contents of affidavit to enforce bond for benefit of state)].

Legal Topics:

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

§§ 79.65[Reserved]



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27-79 California Legal Forms--Transaction Guide § 79.100

§ 79.100 Facts for All Bonds

1. Name of bond applicant.
2. Age of bond applicant, stated both in years and date of birth.
3. Business address and telephone number.
4. Residence address and telephone number.
5. Length of residence in locality.
6. Form of business organization, if applicable.
7. Length of period engaged in business for which bond is required.
8. Information on bond.
 - a. Type of bond required, e.g., license, permit, construction contract, or other.
 - b. Purpose for which bond is required.
 - c. Amount.
 - d. If amount is based on value of property or interest in property (*e.g.*, a probate bond), description of property or interest and:
 - (1) Principal's estimate of value; or

(2) If given pursuant to estimate of beneficiary or court, value as so estimated.

e. Term.

(1) Commencing date.

(2) Expiration date.

f. Whether bond is required annually [*see Code Civ. Proc. § 995.440* (bond subject to Bond and Undertaking Law [*Code Civ. Proc. § 995.010 et seq.*] given as condition of license or permit must be continuous in form and run concurrently with license or permit period); 2 *Cal. Code Reg. § 21902* (term of bonds subject to this regulation must be minimum of 24 months)].

g. To whom bond is to be given and business address.

h. Description of required bond.

9. Whether principal has previously applied to another surety for bond, and result of application.

10. Whether principal has previously been bonded by another surety.

a. Type of bond.

b. Bond amount.

c. Name of surety.

d. Whether bond has been discharged or remains in effect.

e. Whether any claims have been made on bond.

11. Whether principal has or will carry insurance covering activities for which bond is required.

12. Whether applicant has experienced any business failures, and, if so, summary of reasons for failures.

13. Whether there are any judgments or pending suits against applicant.

14. References, including banks, merchants, and others with whom applicant is doing business.

a. Name.

b. Address.

c. Business.

d. Years known.

Legal Topics:

For related research and practice materials, see the following legal topics:
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27-79 California Legal Forms--Transaction Guide § 79.101

§ 79.101 Additional Facts for Bonds Governed by Bond and Undertaking Law

NOTE:

The Bond and Undertaking Law [*Code Civ. Proc. § 995.010 et seq.*] applies to any bond or undertaking executed, filed, posted, furnished, or otherwise given as security pursuant to any California statute, except to the extent that the statute provides a different rule or is inconsistent [*Code Civ. Proc. § 995.020(a)*]. For discussion of the Bond and Undertaking Law, see § 79.50 et seq.

1. Information on proposed sureties, if known.

a. Number of proposed sureties to be used.

NOTE:

A bond governed by the Bond and Undertaking Law must be executed by two or more sufficient personal sureties or one sufficient admitted surety insurer or any combination of sufficient personal sureties and admitted surety insurers [*Code Civ. Proc. § 995.310*].

b. Whether each proposed surety is:

(1) An admitted surety insurer [*see Code Civ. Proc. § 995.120; § 79.51[2]*]; or

(2) A personal surety [*see Code Civ. Proc. §§ 995.510, 995.520; § 79.56*].

c. Name, address, and telephone number of each surety.

d. If personal sureties will be used [*see Code Civ. Proc. § 995.510*]:

(1) Fact that each personal surety is neither a principal, an officer of the court, nor a member of State Bar.

(2) Whether each personal surety is a California resident and either an owner of real property or householder within California.

(3) Description (sufficient for identification) of each personal surety's real and personal property and nature of surety's interest therein that qualifies surety on bond, including:

(a) Surety's best estimate of fair market value of each item of property.

(b) Statement of any charge or lien and its amount known to surety, whether or not of public record.

(c) Any other impediments to possession, use, benefit, or enjoyment of property.

(4) Whether each personal surety is worth amount of bond in real or personal property, or both, situated in California, over and above all debts and liabilities, exclusive of property exempt from enforcement of a money judgment.

(5) If amount of bond exceeds \$10,000 and will be executed by more than two personal sureties, whether aggregate worth of all sureties executing bond is twice amount of bond [*see Code Civ. Proc. § 995.520(d)*].

2. Whether principal gave deposit in lieu of bond in form of any of following [*see Code Civ. Proc. § 995.710* (required face or market value of deposit)]:

NOTE:

Except for filings with the Secretary of State [*see Code Civ. Proc. 995.710(e)*], or to the extent the statute providing for a bond precludes a deposit in lieu of a bond or limits the form of deposit, the principal, instead of giving a bond, may deposit with the officer any of the instruments listed in (a) through (f), **below** [*Code Civ. Proc. § 995.710(a)*].

After January 1, 1999, a deposit may not be used in lieu of a bond for deposits made with the Secretary of State [*Code Civ. Proc. § 995.710(e)*]. Any principal who made a deposit with the Secretary of State pursuant to *Code Civ. Proc. § 995.710* prior to that date may continue to utilize that deposit in lieu of a bond in accordance with *Code Civ. Proc. § 995.710* and the statute that prescribes a bond. However, the deposit will not be renewable [*Code Civ. Proc. § 995.710(e)*].

a. Cash.

b. Bearer bonds or bearer notes of United States or State of California.

NOTE:

The market value of bearer bonds or bearer notes must be agreed upon by stipulation of the principal and beneficiary [*Code Civ. Proc. § 995.720(a)*].

c. Certificates of deposit, not exceeding federally insured amount, issued by federally insured banks or savings associations authorized to do business in California and insured by Federal Deposit Insurance

Corporation.

d. Savings accounts, not exceeding federally insured amount, together with evidence of deposit in savings accounts with banks authorized to do business in California and insured by Federal Deposit Insurance Corporation.

e. Investment certificates or share accounts, not exceeding federally insured amount, issued by savings associations authorized to do business in California and insured by Federal Deposit Insurance Corporation.

f. Certificates for funds or share accounts, not exceeding guaranteed amount, issued by credit union whose deposits are guaranteed National Credit Union Administration or by any other agency approved by Department of Financial Institutions.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil Procedure Remedies Bonds General Overview



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27-79 California Legal Forms--Transaction Guide § 79.102

§ 79.102 Additional Facts for Public Official Bonds

1. Marital status and number of dependents.
2. Official position for which bond is required.
 - a. Title of position.
 - b. Elective or appointive office.
 - c. Term of office.
 - d. Full statement regarding duties of office.
 - e. Compensation (if commissions, amount of percentage, how paid, and when paid).
3. Deputies and clerks employed.
 - a. Number.
 - b. Whether or not bonded, and, if so, by whom.
 - c. Type of surety:
 - (1) Personal sureties; or
 - (2) Admitted surety insurer.

- d. Name and official address of person or entity to which bond is to be given.
- 4. Other bonds furnished by applicant in connection with this or any other official position.
 - a. Positions for which furnished.
 - b. Amounts of bonds.
 - c. Names and addresses of sureties.
- 5. Previous occupancy of position.
 - a. Term.
 - (1) Commencing date.
 - (2) Expiration date.
 - b. Date accounts last audited and by whom.
- 6. Whether applicant has previously been denied a bond or had a bond canceled or refused to be renewed.
 - a. Name of company making cancellation or refusal.
 - b. Reason for cancellation or refusal.
- 7. Income other than salary or fees from office for which bond is required.
 - a. Amount.
 - b. Source.
- 8. Following information on applicant's relatives (parents, brothers, and sisters):

NOTE:

This information is included here because it is requested on the application forms used by admitted surety insurers in connection with public official bonds.

- a. Name.
- b. Address.
- c. Occupation.
- d. Net worth.
- 9. If applicant will be required to make official reports:
 - a. To whom.

b. How often.

10. If books and records of office are audited:

a. Whether audits are required by law.

b. Who performs audits.

c. How often.

d. Date last audit was performed.

11. Applicant's employment record for past seven years.

a. Term of employment.

b. Name of employer.

c. Address of employer.

d. Position.

e. Reason for leaving.

f. Dates of, and reasons for, any periods of unemployment.

12. Financial worth.

a. Real property.

(1) Location.

(2) Common description.

(3) Value.

(4) Mortgage or trust deed.

(5) Name and address of mortgagee or beneficiary.

b. Cash in bank.

c. Stocks and bonds and their market value.

d. Other assets.

e. Debts.

(1) Amount.

(2) Maturity dates.

(3) How incurred.

13. Life Insurance.

a. Amount.

b. Name of insurer.

c. Beneficiary.

14. Details of liabilities and names and addresses of principal creditors.

15. If applicant will handle public funds:

a. Money.

(1) Approximate amount handled during year.

(2) Largest amount on hand at any time.

(3) Period of largest amount.

(4) To whom receipts are turned over.

(5) How often receipts are turned over.

(6) Periods of largest receipts.

b. Depository banks.

(1) Names of banks.

(2) Limit of deposit.

(3) Kind and amount of security given by bank.

(4) Whether law relieves applicant of liability for loss by bank failure.

(5) Who designates depositories.

(6) Name in which deposits are made.

c. Withdrawals.

(1) Whether applicant may withdraw funds on his or her signature.

(2) What countersignature is required.

(3) Whether interest on deposits is paid to applicant personally.

(4) Whether funds are paid on warrants.

(5) Whether warrants become part of check or draft.

d. Taxes.

(1) Approximate amount.

(2) Type of taxes and collecting entity or entities.

(3) Date taxes are turned over to applicant for collection.

(4) Date due.

(5) Date in arrears.

e. Tax settlements.

(1) Date on which applicant makes annual settlements.

(2) With whom settlements are made.

(3) Whether applicant continues to collect delinquent taxes.

(4) How applicant is relieved if liable for uncollected taxes.

(5) How soon after taxes become delinquent are tax sales held or liens filed.

f. Securities.

(1) Amount.

(2) Where deposited.

(3) Degree of joint control.

g. Insurance on money and securities.

(1) Kind.

(2) Amount.

(3) Insurer.

(4) Expiration date.

h. Audit of accounts.

- (1) By whom.
- (2) How often.
- (3) Date of last audit.
- (4) Whether audit is required by law.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil Procedure Remedies Bonds General Overview



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27-79 California Legal Forms--Transaction Guide § 79.103

§ 79.103 Additional Facts for Lost Security or Instrument Bonds

1. Bond amount.
2. To whom given, including registrar and transfer agent, if any.
3. Lost security or instrument.
 - a. Description.
 - (1) If stock certificate:
 - (a) Date of issue.
 - (b) To whom issued.
 - (c) Number and class of shares.
 - (2) If check:
 - (a) Number of check.
 - (b) Date of issue.
 - (c) Name of maker.
 - (d) Name of payee.
 - (3) If insurance policy:

- (a) Number of policy.
- (b) Date of policy.
- (c) Amount.
- (d) Name of insured.
- (e) Name of beneficiary.

(4) If note:

- (a) Date of issue.
- (b) Name of maker and accommodation party, if any.
- (c) Name of payee.
- (d) Whether secured by deed of trust or otherwise. If so, names and addresses of parties and recording information.

b. Market value.

c. Par value, if any.

4. How applicant became owner of lost security or instrument.

- a. When applicant became owner.
- b. Purchase price.
- c. From whom purchased.

5. If registered, in whose name.

6. Whether dividends or interest are being paid and name of recipient.

7. Whether security or instrument was endorsed or assigned, and if so, whether by endorsement or assignment on instrument itself or otherwise.

8. Whether applicant is absolute owner of security or instrument and entitled to its immediate possession free of all claims and liens.

9. Whether notice of loss has been given, and, if so, to whom.

10. If previous application for same bond was made:

- a. Name and address of surety.

b. Circumstances of application.

c. Response to application.

d. Reasons for refusal, if applicable.

11. Whether applicant has ever had a bond application declined.

12. References, preferably bankers and merchants.

a. Name.

b. Address.

c. Occupation.

d. Years known.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil Procedure Remedies Bonds General Overview



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27-79 California Legal Forms--Transaction Guide § 79.104

§ 79.104 Additional Facts for Construction Contract Bonds

1. Name of applicant.
 - a. If applicant is a corporation, exact corporate title.
 - b. If applicant is a partnership, full names of partners.
2. Kinds and amounts of bonds required.
 - a. Proposal or bid bond [*see* § 79.240].
 - b. Performance bond [*see* §§ 79.241-79.243].
 - c. Payment bond [*see* §§ 79.244-79.246].
 - d. Maintenance bond.
3. Name and address of obligee (person or entity to whom bond is to be given).
4. Amount of contract.
 - a. Date awarded, if applicable.
 - b. Probable total of contract.
5. Nature of contract, with concise description of proposed work and locality.

6. Name and address of architect or engineer in charge.
7. Architect's or engineer's estimate of cost of work.
8. Date work is to be commenced.
9. Date work is to be completed.
10. Penalty for noncompletion on time.
11. Premium for advance completion.
12. Whether contract contains a strike clause and/or arbitration provision.
13. Payments under contract.
 - a. When and how payments are to be made.
 - b. Whether payments are to be made wholly in cash and, if not, in what form.
14. Length of time work must be kept in repair after completion and whether a bond is required to cover that maintenance.
15. Approximate amount of contract to be sublet, with description of principal subcontracts as follows:
 - a. Amount.
 - b. Name of subcontractor.
 - c. Address.
 - d. Character of work.
 - e. If bonded, name of bonding company.
16. Other bidders on contract (if known), including highest and lowest.
 - a. Name and address.
 - b. Bid.
17. Other contract work under way or for which applicant is committed, with following information:
 - a. Contract price.
 - b. Kind of construction.
 - c. Location of work.

- d. Payments presently received.
- e. Percentage completed.
- f. Expected completion date.
- g. Name and address of architect or engineer.

18. Following information on all projects applicant has completed in own name:

- a. Contract amount.
- b. Class of work.
- c. Date completed.
- d. Name and address of owner.
- e. If bonded, name of bonding company.

19. Whether applicant has made application to another company for bond now sought and, if so, name of company and result.

20. Whether any accounts receivable, contract proceeds, or sums to be paid on this or any other contract have been assigned, or will be assigned for loans, materials, or equipment and, if so, facts and circumstances surrounding assignment.

21. Whether applicant is having any controversy over any contract or payment of labor or material bills on any contract.

22. Description of all insurance now carried by applicant.

Legal Topics:

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

Banking Law Bonds, Guarantees & Letters of Credit Bonds & Guarantees Civil Procedure Remedies Bonds General Overview Contracts Law Types of Contracts Construction Contracts



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27-79 California Legal Forms--Transaction Guide § 79.105

§ 79.105 Documents

1. Copies of any judgment against applicant.
2. Written references.
3. Financial statement for current period, consisting of the following information:
 - a. Balance sheet.
 - b. Income statement.
 - c. If corporation, statement of retained earnings.
4. For a construction contract bond:
 - a. Copies of contract.
 - b. Plans and specifications.
 - c. Advertisements and instructions to bidders, if any.
5. For a lost securities bond, copies of advertisements or notices when notice of loss has been given.

Legal Topics:

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

Banking LawBonds, Guarantees & Letters of CreditBonds & GuaranteesCivil ProcedureRemediesBondsGeneral

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27-79 California Legal Forms--Transaction Guide §§ 79.106-79.109

[Reserved]

§§ 79.106[Reserved]



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27-79 California Legal Forms--Transaction Guide § 79.110

§ 79.110 Basic Determinations

1. Is suretyship, guaranty, or indemnity required by law [*see* § 79.114]?
2. If there is no statutory requirement, will obligee nevertheless demand such protection?
3. Is nature of underlying transaction such that protection is reasonably necessary?

NOTE:

When protection is reasonably necessary it may be the subject of negotiation and can be used to obtain other concessions.

- a. Consider type of performance required, its location, and any unusual hazards or risks.
- b. Consider length of time allowed for performance and any provisions for liquidated damages.
- c. Consider whether underlying obligation is subject to warranties or agreements (e.g., warranties of fitness of purpose or agreements for continuing operation and maintenance) imposed by law or by specific or implied provisions of underlying agreement.
- d. Consider manner and time of payment, sufficiency of compensation, and other commitments of party performing obligation.
- e. Consider whether and to what extent performance would be affected by unexpected loss.

4. Which is more appropriate in particular situation?

NOTE:

For discussion of the nature and distinctions between suretyship and indemnity, see §§ 79.26, 79.27.

a. Suretyship; or

b. Indemnity.

Legal Topics:

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

Civil Procedure Remedies Bonds General Overview Civil Procedure Remedies Bonds Sureties General Overview Contracts Law Contract Conditions & Provisions Indemnity Contracts Law Types of Contracts Guaranty Contracts



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27-79 California Legal Forms--Transaction Guide § 79.111

§ 79.111 Suretyship

1. Will surety's obligation be conditional or unconditional?

NOTE:

The surety's obligation is unconditional unless the terms of suretyship contain some condition precedent to liability of the surety [*Civ. Code § 2810*].

2. What will be extent of surety's liability?

NOTE:

When a surety assumes liability in connection with a contract the terms of which are not then settled, it is implied that the terms of the contract will not expose the surety to greater risks than under the most common terms in similar contracts at the place where the underlying obligation is to be performed [*Civ. Code § 2799*].

3. Would it be desirable to use a continuing guaranty?

NOTE:

A continuing guaranty is a guaranty relating to future liability of principal, under successive transactions, which either continue the principal's liability or periodically renew it after it has been satisfied [*Civ. Code § 2814; see, e.g., Central Building, LLC v. Cooper (2005) 127 Cal. App. 4th 1053, 1055, 26 Cal. Rptr. 3d 212* (in case in which principals of corporation executed personal guaranties of payment on corporation's commercial lease, guaranty agreements were held to be continuing guaranties of performance under lease that also applied to lease amendments)].

Legal Topics:

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

Civil Procedure Remedies Bonds Sureties General Overview Contracts Law Types of Contracts Guaranty Contracts



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27-79 California Legal Forms--Transaction Guide § 79.112

§ 79.112 Indemnity

1. Who is party to be protected [*see discussion in § 79.30*]?

2. Will indemnity agreement cover:

a. Unlawful acts [*see Civ. Code §§ 2773, 2774*]?

NOTE:

If an unlawful act is committed subsequent to the agreement, the agreement is void if at the time the act is done the actor knows it is unlawful [*Civ. Code § 2773*]. If the unlawful act has already been done at the time of entering into the indemnity agreement, the agreement is valid unless the act constitutes a felony [*Civ. Code § 2774*].

b. Past acts [*Civ. Code § 2774*]?

NOTE:

An agreement to indemnify a person against a past act is valid unless the act was a felony [*Civ. Code § 2774*].

c. Acts of agents [*Civ. Code § 2775*]?

NOTE:

An agreement to indemnify against the acts of a certain person applies not only to that person's acts, but also to those of the person's agents [*Civ. Code § 2775*].

d. Negligence [*see Civ. Code § 2782 et seq.*]?

NOTE:

Indemnification against liability for death, injury, or property damage arising from negligence in connection with a construction contract is generally prohibited [*see Civ. Code* § 2782; *see also* discussion in § 79.24]. The same is generally true of indemnity agreements affecting hauling, trucking, or cartage contracts [*see Civ. Code* § 2784.5; *see also* discussion in § 79.25].

Legal Topics:

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

Contracts LawContract Conditions & ProvisionsIndemnityContracts LawTypes of ContractsGeneral OverviewContracts LawTypes of ContractsGuaranty Contracts



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27-79 California Legal Forms--Transaction Guide § 79.113

§ 79.113 Qualification of Principal

NOTE:

When surety coverage is a possibility, whether the principal qualifies for issuance of a bond must be determined by considering the factors used by sureties in underwriting and evaluating the risk involved. The same factors should be used (but considered in more detail) to calculate the appropriate range of premiums or other compensation reasonably payable for the bond, if the risk is considered acceptable. The underwriting requirements of a surety company should be considered by all parties to a suretyship arrangement.

In the first stages of negotiation of an agreement involving a suretyship arrangement, it should be determined whether the principal and the obligation undertaken will qualify under the usual rules of surety companies and whether it is possible to obtain a favorable premium rate because the principal is especially well qualified. Surety companies usually will not issue bonds for unqualified principals even at a higher than normal premium rate. Principals that are above average in meeting the following requirements may be in a position to receive a specially reduced rate on negotiations with the surety company. The following factors tend to be especially applicable when the principal is to become obligated under a contract requiring performance of complex duties necessitating considerable capital and equipment (such as a construction contract), but they are also generally applicable to most situations.

1. Is principal reliable?
2. What is principal's current financial condition?

NOTE:

The principal's financial condition can be determined through financial statements, including balance sheets and profit and loss statements, and by establishing that assets in

cash and readily convertible into cash, and working capital (current assets less current liabilities), are sufficient to meet the obligation. The statements may be verified by the surety, especially with regard to cash items. Large obligations that become due during the period of performance of the underlying obligation will be considered and may be deducted from the amounts that might otherwise appear to be available to meet obligations of the proposed agreement.

3. Does principal possess sufficient expertise to perform particular obligation undertaken?
4. Does principal have suitable facilities and equipment?
5. What are principal's other responsibilities and commitments?
6. Is compensation to be earned by principal adequate?
 - a. Consider reasonableness of obligations agreed to by principal.
 - b. Compare total contract price to total costs.
 - c. Analyze sufficiency and timing of any progress payments involved.
 - d. Ascertain period of time allowed for performance and reasonableness of any liquidated damages provisions applicable in the event of delay in completing performance.
 - e. Determine extent, amount, and duration of any warranties or indemnities.
 - f. Watch for agreements and warranties that a certain result will be obtained, as compared to less burdensome condition that performance will be completed according to agreement or specifications.

Legal Topics:

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

Civil Procedure Remedies Bonds Sureties General Overview Contracts Law Types of Contracts Guaranty Contracts



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27-79 California Legal Forms--Transaction Guide § 79.114

§ 79.114 Determinations Under Bond and Undertaking Law

1. Is bond required by statute, and, if so, what statute?

NOTE:

The Bond and Undertaking Law (*Code Civ. Proc. § 995.010 et seq.*) applies to bonds and undertakings executed, filed, posted, furnished, or otherwise given as security pursuant to any California statute, except when the statute prescribes a different rule or is inconsistent [*Code Civ. Proc. § 995.020(a)*]. It does not apply to bail bonds or undertakings of bail [*Code Civ. Proc. § 995.020(c)*]. "Statute" includes administrative regulation promulgated pursuant to statute [*Code Civ. Proc. § 995.180*].

2. Does statute providing for bond impose any special limitations that differ from those in Bond and Undertaking Law?

NOTE:

The Bond and Undertaking Law prescribes rules affecting such important matters as the number and qualifications of acceptable sureties [*see Code Civ. Proc. §§ 995.310, 995.510-995.670*], availability of deposit in lieu of bond [*Code Civ. Proc. § 995.710-995.770*], and the substitution of a bond for an undertaking (and vice versa) [*see Code Civ. Proc. § 995.210*]. Therefore, it is important to determine at the outset whether the governing statute contains any differing provisions.

3. Is a bond needed as opposed to an undertaking?

NOTE:

"Bond" includes both of the following [*Code Civ. Proc. § 995.140(a)*]: (1) a surety, indemnity, fiduciary, or like bond executed by both the principal and sureties; and (2) a

surety, indemnity, fiduciary, or like undertaking executed by the sureties alone. "Undertaking" is defined as a surety, indemnity, fiduciary, or like undertaking executed by the sureties alone [*Code Civ. Proc.* § 995.190]. Unless the governing statute provides to the contrary, a bond may be used in any situation in which the statute calls for an undertaking, and vice versa [*Code Civ. Proc.* § 995.210; *see Code Civ. Proc.* § 995.020(a)].

a. If statute provides for bond, does undertaking otherwise satisfy requirements of bond so that it may be given instead?

b. If statute provides for undertaking, does bond otherwise satisfy requirements of undertaking so that it may be given instead?

4. What number and types of sureties are required and available to execute bond?

NOTE:

Unless the statute providing for the bond requires execution by an admitted surety insurer, a bond must be executed by two or more sufficient personal sureties or by one sufficient admitted surety insurer or by any combination of sufficient personal sureties and admitted surety insurers [*Code Civ. Proc.* § 995.310].

5. Does bond require approval?

NOTE:

A bond becomes effective without approval unless the statute providing for the bond requires that it be approved by the court or officer [*Code Civ. Proc.* § 995.410(a)].

6. If more than one surety insurer is to be used, does each understand extent of its liability?

NOTE:

Two or more admitted surety insurers may be sureties on a bond by executing the same or separate bonds for amounts aggregating the required amount of the bond. Each admitted surety insurer is jointly and severally liable to the extent of the amount of the liability assumed by it [*Code Civ. Proc.* § 995.620].

7. What is correct address for service of necessary documents?

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil Procedure Remedies Bonds General Overview



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27-79 California Legal Forms--Transaction Guide §§ 79.115-79.119

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§§ 79.115[Reserved]



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C. Procedural Guide to Suretyship, Guaranty, and Indemnity Agreements

27-79 California Legal Forms--Transaction Guide § 79.120

§ 79.120 Availability and Form of Agreement

1. On a continuing basis, locate and do business with one or more knowledgeable and well placed insurance agents or brokers doing business with or for corporate sureties providing a wide range of surety bonds.
2. Obtain appropriate printed bond or other protective agreement and review it carefully, requesting changes if circumstances require provisions different from those appearing in bond.
3. In unusual circumstances, or if no printed form is available, draft agreement, including:
 - a. Names and positions of parties.
 - b. Description of underlying obligation.
 - c. Conditions of liability or release from liability of parties.
 - d. Provision as to party on whom ultimate burden for payment of loss will fall.

NOTE:

A surety has a right to indemnification, but an indemnitor cannot look elsewhere for reimbursement unless the risk has been insured [*see* § 79.26].

Legal Topics:

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

Civil Procedure Remedies Bonds Sureties General Overview Contracts Law Contract Conditions & Provisions Indemnity Contracts Law Types of Contracts Guaranty Contracts



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27-79 California Legal Forms--Transaction Guide § 79.121

§ 79.121 Procedures Under Bond and Undertaking Law

1. Obtain standard form for bond, or, if there is none, draft agreement.
2. Confirm that bond is in proper form, in writing signed by sureties under oath, and includes [*Code Civ. Proc. § 995.320(a)*]:
 - a. Statement that sureties are jointly and severally liable on obligations of statute providing for bond.
 - b. Addresses at which principal and sureties may be served with documents.
 - c. If amount of bond is based on value of property or an interest in property, description of property or interest and:
 - (1) Principal's estimate of value; or
 - (2) If given pursuant to estimate of beneficiary or court, value as so estimated.
 - (3) If status of admitted surety insurer is in doubt, request certificate of status from county clerk.

NOTE:

If the status of an admitted surety insurer is in doubt, the clerk will issue a certificate stating, among other facts, that the admitted surety insurer is authorized to transact surety insurance and that a transcript or record to that effect is filed in the office of the county clerk [*Code Civ. Proc. § 995.640*]. For discussion of the criteria for approval of admitted surety insurers under the Bond and Undertaking Law, see § 79.57.

4. If personal sureties are used, prepare and file for each surety an affidavit of qualification containing [*Code Civ. Proc.* §§ 995.510(a), 995.520(b); see § 79.201[2] (form for affidavit)]:

- a. A statement that surety is not be the principal, an officer of the court, or member of the State Bar.
- b. Name, occupation, residence address, and business address of surety.
- c. Statement that surety is a resident and either an owner of real property or a householder in California.
- d. Statement that surety is worth amount of bond in real or personal property or both:

NOTE:

If the amount of the bond exceeds \$10,000 and it is executed by more than two sureties, the affidavit may state that the surety is worth less than the amount of the bond and the bond may stipulate that the liability of the surety is limited to the worth of the surety as stated in the affidavit, as long as the aggregate worth of all sureties executing the bond is twice the amount of the bond [*Code Civ. Proc.* § 995.520(d)].

- (1) Situated in California;
- (2) Over and above all debts and liabilities; and
- (3) Exclusive of property exempt from enforcement of money judgment.

e. If amount of bond exceeds \$5,000, the following additional information [*Code Civ. Proc.* § 995.520(c)]:

- (1) Description sufficient for identification of all real and personal property of surety situated in California, and nature of surety's interest therein that qualifies surety on bond;
- (2) Surety's best estimate of fair market value of each item of property;
- (3) Statement of any charge or lien known to surety and its amount (whether of public record or not) against any item of property; and
- (4) Any other impediment or cloud known to surety on free right of possession, use, benefit, or enjoyment of property.

5. At time bond is given by principal [*Code Civ. Proc.* § 995.370]:

- a. Serve copy of bond on beneficiary.

NOTE:

Service of documents under the Bond and Undertaking Law is made in the same manner as service of process in civil actions generally [*Code Civ. Proc.* § 995.030].

- b. Give and file an affidavit of service with bond.

6. If deposit with Secretary of State was given in lieu of bond before January 1, 1999 [*see Code Civ. Proc. § 995.710(a), (e)*]:

a. Advise principal that he or she may continue to use that deposit in lieu of bond, in accordance with *Code Civ. Proc. § 995.710* and statute prescribing bond [*see Code Civ. Proc. § 995.710(e)*].

b. Advise principal that deposit will not be renewable [*Code Civ. Proc. § 995.710(e)*].

Legal Topics:

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

Civil Procedure Remedies Bonds General Overview Civil Procedure Remedies Bonds Sureties General Overview Contracts Law Types of Contracts Guaranty Contracts



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DIVISION V: CONTRACTS AND OBLIGATIONS
CHAPTER 79 SURETYSHIP, GUARANTY, AND INDEMNITY
PART III. TRANSACTION GUIDE
C. Procedural Guide to Suretyship, Guaranty, and Indemnity Agreements

27-79 California Legal Forms--Transaction Guide §§ 79.122-79.129

[Reserved]

§§ 79.122[Reserved]



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PART III. TRANSACTION GUIDE
D. Related and Subsequent Procedures Under Bond and Undertaking Law

27-79 California Legal Forms--Transaction Guide § 79.130

§ 79.130 Reduction of Amount or Cancellation of Bond

1. For reduction of amount of bond, request determination that bond is excessive.

NOTE:

The amount of a bond given other than in an action or proceeding may be determined to be excessive by the officer, who may order the amount reduced to that which in the officer's discretion appears proper under the circumstances. The order is subject to any limitations in the statute providing for the bond [*Code Civ. Proc. § 996.030(a)*]. The determination is made on motion or affidavit of the principal in the same manner as a motion or affidavit for a determination that a bond is insufficient except that the notice of motion or order to show cause made pursuant to the affidavit is served on the beneficiary [*Code Civ. Proc. § 996.030(b)*]. The principal may give a new bond for the reduced amount and the sureties may be the same sureties as on the original bond [*Code Civ. Proc. § 996.030(c)*].

2. If surety desires to cancel bond, it must do the following:

NOTE:

Cancellation or withdrawal of a surety is effective at the earliest of (1) 30 days after notice of cancellation or withdrawal is given; (2) if a new surety is substituted for the original surety, the date the substitution becomes effective; or (3) if a new bond is given, the date the new bond becomes effective [*Code Civ. Proc. § 996.330*].

- a. Give notice of cancellation or withdrawal to the officer to whom bond was given, in same manner as bond was given [*Code Civ. Proc. § 996.320*].

b. At the same time, mail or deliver copy of notice of cancellation or withdrawal to principal [*Code Civ. Proc.* § 996.320].

3. If surety cancels bond:

NOTE:

If a surety cancels or withdraws from a bond, the bond remains in full force and effect for all liabilities incurred before, and for acts, omissions, or causes existing or which arose before the cancellation or withdrawal [*Code Civ. Proc.* § 996.360(a)]. The surety is not liable for any act, default, or misconduct of the principal or other breach of condition of the bond that occurs, or for any liabilities on the bond that arise, after the cancellation or withdrawal [*Code Civ. Proc.* § 996.360(b)].

a. Establish whether new bond is necessary.

NOTE:

No new bond is necessary to maintain the original bond in effect if the withdrawal of a surety does not reduce the amount of the bond or the number of sureties below the minimum required by the statute providing for the bond [*Code Civ. Proc.* § 996.350].

b. If new bond is necessary, instruct principal to give new bond within 30 days after receiving notice of cancellation or withdrawal of surety.

NOTE:

If the principal does not give a new bond within 30 days after notice of cancellation or withdrawal is given, all rights and privileges obtained by giving the original bond immediately cease [*Code Civ. Proc.* § 996.340(a)]. A person whose license is suspended for failure to give a new bond may not operate or carry on business pursuant to the license during the period of suspension. A suspended license may be revived only by the giving of a new bond during the license period in which the cancellation or withdrawal occurred [*Code Civ. Proc.* § 996.340(b)].

Legal Topics:

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

Civil Procedure Remedies Bonds General Overview Contracts Law Performance General Overview



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DIVISION V: CONTRACTS AND OBLIGATIONS
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PART III. TRANSACTION GUIDE
D. Related and Subsequent Procedures Under Bond and Undertaking Law

27-79 California Legal Forms--Transaction Guide § 79.131

§ 79.131 New, Additional, and Supplemental Bonds

1. Ascertain circumstances requiring new, additional, or supplemental bond [*Code Civ. Proc.* § 996.210; see discussion in § 79.61].
 - a. Required by order of court or officer.
 - b. New bond may be given:
 - (1) If a surety withdraws from or cancels original bond; or
 - (2) To obtain release of sureties from liability on the original bond.
2. Verify that new, additional, or supplemental bond [*Code Civ. Proc.* § 996.220]:
 - a. Is in same form as original bond.
 - b. Has same obligations as original bond.
 - c. Is same as original bond in all other respects.
 - d. Is in an amount sufficient for purpose for which it is given.
 - e. Recites:
 - (1) Names of remaining original sureties.
 - (2) Name of new surety.

(3) Amount for which new surety is liable.

Legal Topics:

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

Civil Procedure Remedies Bonds General Overview



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27-79 California Legal Forms--Transaction Guide §§ 79.132-79.199

[Reserved]

§§ 79.132[Reserved]



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PART IV. FORMS

A. License, Permit, and Miscellaneous Bonds

27-79 California Legal Forms--Transaction Guide § 79.200

§ 79.200 License or Permit Bond

[1] Comment

[a] Use of Form

The form in [2], below, is for use when a bond of a licensee or permittee is required by law and there is no approved bond form provided by law, ordinance, or regulation requiring the bond. This bond form may be used to satisfy the requirements of municipalities and counties with respect to their issuance of licenses and permits. The bond provides that it will be void and the surety not liable if the principal complies with all of the "statutes, ordinances, rules, and regulations and any amendments thereto" that require the bond to be obtained.

Unless the statute, regulation, or ordinance requiring the bond requires the bond to be executed by an admitted surety insurer, a bond must be executed either by two or more sufficient personal sureties, or one sufficient admitted surety insurer, or any combination of sufficient personal sureties and admitted surety insurers [*Code Civ. Proc.* § 995.310; see discussion in § 79.53]. If executed by personal sureties, the bond must be accompanied by an affidavit or declaration of qualifications of each surety [*Code Civ. Proc.* § 995.520(a)]. For a form for declaration of qualifications of personal surety, see § 79.201[2].

Most admitted sureties will have their own forms for license and permit bonds and will require that their own forms be used.

[b] Classes of License and Permit Bonds

License and permit bonds fall into the following general categories:

- Credit guaranty bonds. These bonds guarantee that the principal will pay over amounts received in the course of its business to the obligee when collections were made for that party; or to customers of the principal when payment is to be made to them and the law requires a bond to protect them. Examples of credit guaranty bonds are gasoline distributors' or dealers' bonds, bonds for other sellers of merchandise

subject to a sales tax, collection agencies, commission merchants, and motor carriers accepting C.O.D. shipments. The main qualification for this type of bond is sound financial condition that will tend to show that the principal will not become insolvent during the term of the bond.

- Financial guaranty bonds. This type of bond guarantees that the principal will pay to the licensing authority (or to others) amounts that become due in connection with the conduct of business for which the license was granted. Examples of this type of bond are liquor dealers' tax bonds and milk dealers' bonds for payment of milk purchased.

- Indemnity bonds. This type of bond guarantees that a licensee or permittee will comply with laws or ordinances under which the license or permit was granted. They relate to the principal's obligations to pay damages, normally unliquidated, which can be established by suit on the bond. Examples are bonds furnished by electrical contractors to guarantee that their work will comply with the applicable building code, and permits requiring the principal to post a bond guaranteeing compliance with a municipal ordinance and payment of taxes and fees, and providing that the city be held harmless from any liability.

[c] Contents of Bond

A bond must be in writing, signed by the sureties under oath, and must include the following [*Code Civ. Proc.* § 995.320(a); see also *Code Civ. Proc.* § 995.440 (discussed in [f], below)]:

- A statement that the sureties are jointly and severally liable on the obligations of the statute providing for the bond.
- The address at which the principal and sureties may be served with notices, papers, and other documents required by the Bond and Undertaking Law (*Code Civ. Proc.* § 995.010 et seq.).
- If the amount of the bond is based on the value of property or an interest in property, a description of the property or interest and the principal's estimate of the value of the property or interest, or, if given pursuant to the estimate of the beneficiary or court, the value as so estimated [see § 79.202[2], last "WHEREAS"].

Optional Condition 4 recites that the bond is subject to the statutes, rules, regulations, or ordinances which required its issuance.

For discussion of *Code Civ. Proc.* § 995.630, which sets forth the formalities with which an admitted surety must execute the bond, see § 79.57[1].

[d] Stipulation Limiting Liability

If the amount of the bond exceeds \$10,000 and is executed by more than two personal sureties, the affidavit may state that the surety is worth less than the amount of the bond and the bond may stipulate that the liability of the surety is limited to the worth of the surety stated in the affidavit, as long as the aggregate worth of all sureties executing the bond is twice the amount of the bond [*Code Civ. Proc.* § 995.520(d); see discussion in § 79.56[2]]. Alternative Condition 1 sets forth such a stipulation.

[e] Service of Bond

At the time a bond is given, the principal serves a copy of the bond on the beneficiary. An affidavit of service must be given and filed with the bond [*Code Civ. Proc.* § 995.370].

[f] Approval of Bond

A bond becomes effective without approval unless the statute providing for the bond requires that it be approved by the court or officer [*Code Civ. Proc. § 995.410(a)*]. If the statute providing for the bond requires that the bond be approved, the court or officer may approve or disapprove the bond on the basis of the affidavit or certificate of the sureties, or may require the attendance of witnesses and production of evidence and may examine the sureties under oath regarding their qualifications [*Code Civ. Proc. § 995.410(b)*]; see discussion in §§ 79.54, 79.57[1], [2]]. For forms for use in approving or objecting to approval of a bond, see California Forms of Pleading and Practice, Ch. 538, *Suretyship, Bonds, and Undertakings*.

[g] Effectiveness and Duration of Bond

A bond is effective when it is given or, if the statute providing for the bond requires that it be approved, when it is approved, unless the statute provides that the bond becomes effective at a different time [*Code Civ. Proc. § 995.420(a)*]. If the bond is to become effective other than when it is given or approved, it is effective at the time provided unless an objection to the bond is made before that time, in which case it becomes effective when the court makes an order determining the sufficiency of the bond [*Code Civ. Proc. § 995.420(b)*].

A bond remains in force and effect until the earliest of the following events:

- The sureties withdraw from or cancel the bond or a new bond is given in place of the original [*Code Civ. Proc. § 995.430(a)*].
- The purpose for which the bond was given is satisfied or the purpose is abandoned without any liability having been incurred [*Code Civ. Proc. § 995.430(b)*].
- A judgment of liability on the bond that exhausts the amount of the bond is satisfied [*Code Civ. Proc. § 995.430(c)*].
- The term of the bond expires. Unless the statute providing for the bond prescribes a fixed term, the bond is continuous [*Code Civ. Proc. § 995.430(d)*]. The bond in [2], below, includes optional language stating the expiration date of its initial term [*but see Code Civ. Proc. § 995.440*].

The term of a bond given as a condition of a license or permit is continuous. The bond remains in full force and effect and runs concurrently with the license or permit period and any and all renewals, or until cancellation or withdrawal of the surety from the bond [*Code Civ. Proc. § 995.440*]. The optional language in Condition 3 sets forth this requirement.

[2] FORM**License or Permit Bond**

License or Permit Bond

KNOW ALL PERSONS BY THESE PRESENTS:

THAT WE, _____ [*name and address of principal*] (hereinafter called "Principal") and _____ [*name(s), address(es), and status, if relevant of surety or sureties, e.g., ABC Insurance, a corporation organized and existing under the laws of the State of _____ and duly authorized to transact business as a general surety in the State of California, with its principal office at _____ (address)*] as Surety, are held and firmly bound unto _____ [*specify obligee, e.g., the People of the State of California*] in the sum of \$ _____, in lawful money of the United States, for payment of which we

bind ourselves, our personal representatives, our heirs, executors, administrators, successors, and assigns, jointly and severally, firmly by these presents.

WHEREAS, Principal has [been granted or applied for] a [license or permit] to _____ [specify purpose of license or permit, e.g., carry on business as _____ (type of business) at _____ (address)], commencing on _____ [date or the filing of this bond]; and

WHEREAS, the provisions of [specify statute, regulation, and/or ordinance that requires bond] require that the Principal file or have on file with [entity with which bond is to be filed] a [copy of a] bond in the sum of \$_____ and this bond is executed in accordance therewith;

NOW, THEREFORE, the condition of this obligation is that if Principal shall[, during the period commencing on the date set forth above,] faithfully observe and honestly comply with the statutes, ordinances, rules, and regulations, and any amendments thereto, that require the execution of this bond, then this obligation is void; otherwise it shall remain in full force and effect [until _____ (date)], subject, however, to the following conditions:

[EITHER]

1. The aggregate liability of the Surety hereunder on all claims whatsoever shall not exceed the sum of this bond.

[OR, if amount of bond exceeds \$10,000, is executed by more than two personal sureties, the aggregate worth of all sureties is twice the amount of the bond, and a personal surety limits his or her liability:]

1. The aggregate worth of all sureties executing this bond is \$_____, which is twice the amount of the bond. Therefore, pursuant to *Code of Civil Procedure Section 995.520(d)*, it is hereby stipulated and agreed by and between the [Principal and] sureties that the liability of _____ [name(s) of surety or sureties] on this bond [is or are] limited _____ [his or her or their] worth as stated in _____ [his or her or their] accompanying declaration.

[Continue with the following:]

2. This bond may be canceled by the Surety and Surety relieved of all further liability hereunder by the Surety giving 30 days written notice to the Principal and Oblige. [On giving notice of cancellation, Surety shall be discharged from all liability under this bond for any act or omission of the Principal occurring after the expiration of 30 days from the date of receipt of the notice.]

[3. This bond is deemed continuous in form and shall remain in full force and effect for the term of the initial bond and all subsequent riders, for all liabilities, acts, omissions, or causes arising after this bond becomes effective and before cancellation or withdrawal of the Surety from the bond.]

[4. This bond is executed to comply with the provisions of _____ (specify statute, regulation, and/or ordinance that requires bond) and Chapter 2 (commencing with *Section 995.010*), Title 14, Part 2 of the *California Code of Civil Procedure* and this bond is subject to the terms and provisions thereof.]

IN WITNESS WHEREOF Principal and [Surety or Sureties] have executed this instrument on _____ [date].

PRINCIPAL

_____ [signature of principal]
 _____ [typed name]

SURETY

_____ [signature of surety]
 _____ [typed name]

[By _____ (typed name and title, if applicable)]

SURETY

_____ [signature of surety]
 _____ [typed name]

[By _____ (typed name and title, if applicable)]

Acknowledgment

[Use a separate acknowledgment for each person or entity executing the bond. Acknowledgments taken in California must be in the following form (Civ. Code § 1189(a)):]

State of California

County of _____

On [date], before me _____ [name and title of officer taking acknowledgment], personally appeared _____ [name(s) of person(s) signing instrument], who proved to me on the basis of satisfactory evidence to be the person[s] whose name[s] [is or are] subscribed to the within instrument and acknowledged to me that [she or he or they] executed the same in [her or his or their] authorized [capacity or capacities], and that by [her or his or their] [signature or signatures] on the instrument, the person[s] or the entity upon behalf of which the person[s] acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

_____ [signature]

[seal]

Legal Topics:

For related research and practice materials, see the following legal topics:
 Civil Procedure Remedies Bonds General Overview



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A. License, Permit, and Miscellaneous Bonds

27-79 California Legal Forms--Transaction Guide § 79.201

§ 79.201 Declaration of Qualifications of Personal Surety

[1] Comment

[a] Use of Form

The form in [2], below, is a declaration of a personal surety providing a bond for use whenever personal sureties execute a bond in accordance with the Bond and Undertaking Law (*Code Civ. Proc. § 995.010 et seq.*). Any bond executed by personal sureties will require at least two sufficient personal sureties [*Code Civ. Proc. § 995.310*] and must be accompanied by an affidavit of qualifications of each surety [*Code Civ. Proc. § 995.520(a)*]. A personal surety cannot be the principal, an officer of the court, or member of the State Bar [*Code Civ. Proc. § 995.510(a)(1)*; see Paragraph 1].

[b] Contents of Declaration

The affidavit (or declaration under *Code Civ. Proc. § 2015.5*) must contain all of the following information [*Code Civ. Proc. § 995.520(b)*]:

- The name, occupation, residence address, and business address (if any) of the surety [Paragraph 2].
- A statement that the surety is a resident, and either an owner of real property or householder, within California [Paragraph 2].
- A statement that the surety is worth the amount of the bond in real or personal property, or both, situated in California, over and above all debts and liabilities, exclusive of property exempt from enforcement of a money judgment [first alternative Paragraph 3].

If the amount of the bond exceeds \$5,000, the affidavit or declaration must also contain all of the following information [*Code Civ. Proc. § 995.520(c)*]:

- A description sufficient for identification of real and personal property situated in California, and the nature of the surety's interest therein that qualifies the surety on the bond [Paragraph 4].
- The surety's best estimate of the fair market value of each item of property [Paragraph 4].
- A statement of any charge or lien and its amount, known to the surety, whether of public record or not, against any item of property [second alternative Paragraph 5].
- Any other impediment or cloud known to the surety on the free right of possession, use, benefit, or enjoyment of the property [second alternative Paragraph 5].

When a surety's affidavit or declaration states he or she is worth less than the amount of the bond, and includes a statement of his or her worth [second alternative Paragraph 3], the liability of that surety may be limited to that amount. This limitation is only available if the bond exceeds \$10,000 in amount, includes a liability stipulation, and is executed by more than two sureties, the aggregate worth of whom is twice the amount of the bond [*Code Civ. Proc.* § 995.520(d)]. For a provision in a bond limiting a personal surety's liability on the bond to his or her worth, see § 79.200[2], alternative Condition 1.

[2] FORM

Declaration of Qualifications of Surety

Declaration of Qualifications of Surety

I, _____[*name*], declare:

1. I am one of the personal sureties who executed the bond pursuant to [*specify statute, rule, regulation, or ordinance, requiring bond*] to guarantee the obligations of _____[*name of principal on bond*] as [*status of principal, e.g., licensee*] and make this declaration in support of that bond.
2. I am not an officer of the court or a member of the State Bar of California and am a resident and [an owner of real property or householder] in California. My occupation is [*specify*]. My residence address is _____[*street address and city*], and my business address is _____[*street address and city*].

[*EITHER*]

3. I am worth \$_____, the amount of the bond, in [real and/or personal] property situated in California, over and above all my debts and liabilities, exclusive of property exempt from enforcement of a money judgment.

[*OR, if the amount of the bond exceeds \$10,000, is executed by more than two sureties, and the aggregate worth of all sureties executing the bond is twice the amount of the bond:*]

3. I am worth \$_____, which is an amount less than the amount of the bond, as provided in Sections 995.510(b) and 995.520(d) of the Code of Civil Procedure, in [real and/or personal property] situated in California, over and above all my debts and liabilities, exclusive of property exempt from enforcement of a money judgment.

[*Continue with the following:*]

[ADD, if the amount of the bond exceeds \$5000]

4. The [interest(s) in] property belonging to me and relied on by me as qualifying me on the bond, the extent of my interest therein, and my best estimate of the fair market value of each item of property, is as follows: *[identify each item, describe the nature of the ownership interest in each item (for example, ownership in fee), and estimate the net fair market value of each item]*.

[EITHER]

5. The property is subject to no charges or liens, of public record or otherwise, known to me. Nor is the property subject to any impediment or cloud known to me on the free right of possession, use, benefit, or enjoyment.

[OR]

5. The property is subject to the following charges and/or liens: *[specify, giving amounts]*. Other than the foregoing charges and/or liens, the property is not subject to any other impediments or cloud known to me on the free right of possession, use, benefit, or enjoyment.

[Continue with the following:]

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ *[date]*

_____ *[signature of surety]*

_____ *[typed name]*

Legal Topics:

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

Civil Procedure Remedies Bonds General Overview Civil Procedure Remedies Bonds Sureties General Overview Civil Procedure Remedies Bonds Sureties Procedures



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A. License, Permit, and Miscellaneous Bonds

27-79 California Legal Forms--Transaction Guide § 79.202

§ 79.202 Probate Bond

[1] Comment

[a] Use of Form

The form in [2], below, is for use by a person who is appointed as personal representative of a decedent's estate. Except as otherwise provided by statute, every person appointed as personal representative must give a bond approved by the court before his or her letters can be issued [*Prob. Code § 8480(a), (c); but see Prob. Code §§ 7621(d), 8481* (exceptions when estate is administered by public administrator or bond is waived by beneficiaries)]. The provisions of the Bond and Undertaking Law (*Code Civ. Proc. § 995.010 et seq.*) apply to a personal representative's bond, except to the extent that Division 7 of the Probate Code (*Prob. Code §§ 7000-12591*) is inconsistent [*Prob. Code § 8487*]. If executed by personal sureties, the bond must be accompanied by an affidavit or declaration of qualifications of each surety [*Code Civ. Proc. § 995.520(a)*]. For a form for a declaration of qualifications of personal surety, see § 79.201[2]. Most admitted sureties will have their own form of probate bond and will require that their own form be used.

The bond is conditioned on the personal representative's faithful execution of the duties of the office according to law and is for the benefit of "interested persons" [*Prob. Code § 8480(b); see Prob. Code § 48* ("interested persons" are those who have property right, in or claim against, estate); *Code Civ. Proc. § 995.310* (contents of bond under Bond and Undertaking Law)]. Although the beneficiary named in the bond is the State of California, as the bracketed optional language indicates, it inures to the benefit of those persons interested in the estate and they may file claims against it [*Prob. Code § 8488(a)* (decedent's estate and persons interested therein have right of action on bond); *see also Code Civ. Proc. §§ 995.130(b), 996.850*]. Alternative Condition 1 sets forth a stipulation that may be used if (1) the amount of the bond exceeds \$10,000, (2) the bond is executed by more than two personal sureties, (3) one surety's worth is less than the amount of the bond, and (4) the aggregate worth of all sureties executing the bond is twice the amount of the bond [*Code Civ. Proc. § 995.520(d); see discussion in § 79.56[2]*].

If two or more persons are appointed, the court may require either a separate bond from each or a joint and several bond. If a joint bond is furnished, the liability on the bond is joint and several [*Prob. Code § 8480(a)*].

The bond is filed with the court and is preserved in the office of the clerk of the court [*Code Civ. Proc.* § 995.340(a)].

[b] Amount of Bond

The amount of the bond is fixed by the court, but may not be more than the sum of the following [*Prob. Code* § 8482(a)]:

- The estimated value of the personal property;
- The probable annual gross income of the estate; and
- If independent administration is granted as to real property, the estimated value of the decedent's interest in the real property.

Notwithstanding the above requirements, if the bond is given by an admitted surety insurer, the court may establish a fixed minimum amount for the bond, based on the minimum premium required by the admitted surety insurer [*Prob. Code* § 8482(b)]. If the bond is given by personal sureties, the amount of the bond must be twice the amount fixed by the court under *Prob. Code* § 8482(a) [*Prob. Code* § 8482(c); see also *Prob. Code* § 8482(d) (increase in amount of bond for sale of estate real property); *Prob. Code* § 8483 (determining amount of bond when some of estate property is placed in blocked account)].

The optional second "WHEREAS" is for use to comply with *Code Civ. Proc.* § 995.320(a)(3), discussed in § 79.200[1][c].

[c] Approval of Bond

Approval of the bond is required in accordance with the Bond and Undertaking Law [see *Code Civ. Proc.* § 995.410, discussed in §§ 79.54, 79.57[1], [2]]. For forms for use in approving or objecting to approval of a bond, see California Forms of Pleading and Practice, Ch. 538, *Suretyship, Bonds, and Undertakings* (Matthew Bender).

[d] Term of Bond

The bond is effective at the time it is approved [*Code Civ. Proc.* § 995.420(a)], and remains in force and effect until the earliest of the following events [*Code Civ. Proc.* § 995.430; see discussion in § 79.55]:

- The sureties withdraw from or cancel the bond or a new bond is given in place of the original bond [see *Code Civ. Proc.* § 995.310 et seq. (procedure for withdrawal)].
- Administration of the estate is completed, and the personal representative is discharged [see *Prob. Code* §§ 8480(b), 12200-12206, 12250-12252].
- A judgment of liability on the bond that exhausts the amount of the bond is satisfied.
- The term of the bond expires.

[e] Limitation Period for Action on Bond

No action may be maintained against the sureties on the bond of the personal representative unless commenced within four years from the discharge or removal of the personal representative or within four years from the date the order surcharging the personal representative becomes final, whichever is later [*Prob. Code* § 8488(b)] In any case, and notwithstanding *Prob. Code* § 7250(c) (judgment or order regarding decedent's estate procured by fraud), no action may

be maintained against the sureties on the bond unless commenced within six years from the date the judgment under *Prob. Code* § 7250 or the later of the orders under *Prob. Code* § 8488(b) becomes final [*Prob. Code* § 8488(c)].

[2] FORM

Probate Bond

Bond of Personal Representative of Decedent

KNOW ALL PERSONS BY THESE PRESENTS:

WHEREAS, the Superior Court of California, County of _____, in Action number _____, entitled, Estate of _____ [name], Deceased, issued an order on _____ [date], appointing _____ [name and address of personal representative] as personal representative of that estate (hereinafter called "Principal"), and letters [testamentary or of administration] were directed to be issued to Principal on _____ [his or her] filing a bond in favor of the State of California for the benefit of interested persons as provided by *Probate Code Sections 8480 through 8488*, inclusive; [and]

[ADD, if amount of bond is based on value of property or interest in property:]

WHEREAS, the [interest in] property on which the amount of this bond is based[, and which is relied on by the _____ (surety or sureties) as qualifying them on the bond] is as follows: [describe the property or properties or interest in property], which is estimated by the _____ [Principal or _____ (name), a beneficiary of the estate, or the court] to have the fair market value[s] of [the following:] [specify fair market value of each property or interest];

[Continue with the following:]

NOW THEREFORE, we, Principal and _____ [name(s), address(es), and status, if relevant, of surety or sureties, e.g., ABC Insurance, a corporation organized and existing under the laws of the State of _____ and duly authorized to transact business as a general surety in the State of California, with its principal office at _____ (address)] as Surety, are held and firmly bound unto the People of the State of California [for the benefit of interested persons as provided by *Probate Code Section 8480* in the sum of \$_____, in lawful money of the United States, for payment of which we bind ourselves, our personal representatives, our heirs, executors, administrators, successors, and assigns, jointly and severally, firmly by these presents.

THE CONDITION OF THIS OBLIGATION IS that if Principal shall faithfully observe and honestly comply with the statutes, rules, and regulations, and any amendments thereto, that require the execution of this bond, then this obligation is void; otherwise it shall remain in full force and effect, subject, however, to the following conditions:

[EITHER]

1. The aggregate liability of the Surety hereunder on all claims whatsoever shall not exceed the sum of this bond.

[OR, if amount of bond exceeds \$10,000, is executed by more than two personal sureties, the aggregate worth of all sureties is twice the amount of the bond, and a personal surety limits his or her liability:]

1. The aggregate worth of all sureties executing this bond is \$_____, which is twice the amount of the bond. Therefore, pursuant to *Code of Civil Procedure Section 995.520(d)*, it is hereby stipulated and agreed by and between the [Principal and] sureties that the liability of _____ [name(s) of surety or sureties] on this bond is limited to _____ [his or her or their] worth as stated in _____ [his or her or their] accompanying declaration.

[Continue with the following:]

2. This bond may be canceled by the Surety and Surety relieved of all further liability hereunder by the Surety giving 30 days written notice to the Principal and Oblige. [On giving notice of cancellation, Surety shall be discharged from all liability under this bond for any act or omission of the Principal occurring after the expiration of 30 days from the date of receipt of the notice.]

IN WITNESS WHEREOF Principal and [Surety or Sureties] have executed this instrument on _____ [date].

PRINCIPAL

_____ [signature of principal]
 _____ [typed name]
 [By _____ (typed name and title, if applicable)]

SURETY

_____ [signature of surety]
 _____ [typed name]
 [By _____ (typed name and title, if applicable)]

SURETY

_____ [signature of surety]
 _____ [typed name]
 [By _____ (typed name and title, if applicable)]

Acknowledgment

[See § 79.200[2].]

The above bond is approved.

_____ Dated:

_____ [signature]

Judge of the Superior Court

Legal Topics:

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

Civil Procedure Remedies Bonds General Overview Estate, Gift & Trust Law Probate Procedures in Probate General Overview



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PART IV. FORMS

A. License, Permit, and Miscellaneous Bonds

27-79 California Legal Forms--Transaction Guide § 79.203

§ 79.203 Notary Public Bond

[1] Comment

[a] Use of Form

The form in [2], below, is for use by a person appointed a notary public. Every person appointed a notary public must execute an official bond in the sum of \$15,000. The bond must be executed by an admitted surety insurer and not a deposit in lieu of bond [Gov. Code § 8212] or a bond executed by personal sureties. Most admitted sureties will have their own form of notary public bond and will require that their form be used.

No later than 30 days after the beginning of the term prescribed in the commission, every person who is appointed a notary public must file the bond and take, subscribe, and file an oath of office in the county clerk's office of the county in which that person maintains his or her principal place of business, as shown in the application submitted to the Secretary of State. The commission does not take effect unless this is done within the 30-day period. The county clerk transmits to the Secretary of State a certificate setting forth the fact of the filing of the bond and containing a copy of the official oath. The bond is then recorded [Gov. Code § 8213(a)], and returned by the county recorder to the person named in the instrument and, if no person is named, to the party leaving it for recording [Gov. Code § 8213(e)].

The notary public and the sureties on the notary public's official bond are liable in a civil action to the persons injured by the official misconduct or neglect of a notary public for all damages sustained [Gov. Code § 8214].

[b] Revocation of Bond by Surety

Unlike most bonds subject in part to the Bond and Undertaking Law (*Code Civ. Proc. § 995.010 et seq.*), when a surety on a notary bond desires to be released from responsibility on account of future acts, the release must be pursuant to *Code Civ. Proc. §§ 996.110-996.150* (usually applicable only to bonds required in actions or proceedings) and not by cancellation or withdrawal pursuant to *Code Civ. Proc. §§ 996.310-996.360*. For this purpose, the surety must make application to the superior court of the county in which the notary public's principal place of business is located, and the copy of the application and notice of hearing must be served on the Secretary of State as the beneficiary [Gov. Code §

8216].

[2] FORM**Notary Public Bond****Notary Public Bond**

	)
Recording requested by	)
_____ [name]	)
When recorded mail to	)
_____ [name]	)
_____ [address]	)
_____ [city, state, zip]	)
	)

 Space above this line for recorder's use

The fee charged for this bond is \$_____ per annum.

KNOW ALL PERSONS BY THESE PRESENTS:

WHEREAS, _____ [name and address of principal] (hereinafter called "Principal") has been duly appointed a notary public in and for the State of California for a term of four years; and

WHEREAS, *Section 8212 of the Government Code* requires every notary public to furnish a bond made payable to the State of California in the sum of \$ 15,000;

NOW, THEREFORE, we, Principal, and _____ [name(s), address(es), and status of surety, e.g., ABC Insurance, a corporation organized and existing under the laws of the State of _____ and duly authorized to transact business as a general surety in the State of California, with its principal office at _____ (address)] as Surety, are held and firmly bound unto the State of California in the sum of \$15,000, in lawful money of the United States, for payment of which we bind ourselves, our heirs, executors, administrators, successors, and assigns, jointly and severally, firmly by these presents.

THE CONDITION OF THE ABOVE OBLIGATION IS SUCH that if the Principal shall well, truly, and faithfully perform all official duties now required of him or her by law, and also all additional duties that may be imposed on him or her by any existing law of the State of California or any law enacted subsequently to the execution of this bond, then this obligation shall be void. Otherwise, it shall remain in full force and effect.

IN WITNESS WHEREOF Principal and Surety [or Sureties] have executed this instrument on _____ [date].

PRINCIPAL

_____ [signature of principal]
 _____ [typed name]

SURETY

_____ [signature of surety]
 _____ [typed name]

[By _____ (*typed name and title, if applicable*)]

Acknowledgment

[See § 79.200[2].]

Legal Topics:

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

Civil Procedure Remedies Bonds General Overview Civil Procedure Remedies Bonds Executions



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27-79 California Legal Forms--Transaction Guide § 79.204

§ 79.204 General Purpose Surety Bond Form

[1] Comment--Use of Form

The form in [2], below, is for use when a surety bond is required and no printed form is available, particularly when an individual rather than a licensed corporate surety is involved. Counsel may use the provisions as appropriate to draft a surety bond for a specific situation or may incorporate one or more of the provisions in other forms of surety bond in this chapter.

The form contains the following essential features:

- The names, addresses, statues, and capacities of the parties to the agreement. A bond given in accordance with statute and governed by Bond and Undertaking Law [*Code Civ. Proc. § 995.010 et seq.*] must include address at which principal and sureties may be served with notices, papers, and other documents required by that law [*see Code Civ. Proc. § 995.320(a)* and discussion in § 79.200[1][c]].
- The principal sum of the bond or maximum liability of the surety.
- The obligation being bonded, often including the attachment and incorporation by reference of the underlying agreement [*see* optional "WHEREAS" relating to lease].
- Proper execution by the principal and the surety. If only the surety signs, the instrument is technically known as an undertaking rather than a bond [*Code Civ. Proc. § 995.190*].

Although not essential, conditions on the rights and liabilities of the parties are often necessary to obtain the desired arrangement. Some conditions are prohibited in particular types of bonds, such as mechanics' lien (labor and materials) bonds [*see Civ. Code § 3225; Wm. R. Clarke Corp. v. Safeco Ins. Co. of America (1997) 15 Cal. 4th 882, 886, 888, 890, 893-897, 64 Cal. Rptr. 2d 578, 938 P.2d 372 (discussed in § 79.244[1][c])*]. Any private statute of limitations created in the bond must be reasonable [*see Jew v. Pacific Employers Ins. Co. (1961) 196 Cal. App. 2d 310, 315, 16*

Cal. Rptr. 542 ; see also Civ. Code §§ 3239, 3240 (in payment bond, period cannot be shortened to less than six months, and bond must be recorded)].

[2] FORM

General Purpose Surety Bond Form

Surety Bond

Surety bond given by _____ *[name and address, and status if other than individual, of principal]*, as Principal and _____ *[name and address, and status if other than individual, of surety]*, as Surety, to _____ *[name and address, and status if other than individual, of obligee]*, as Obligee.

Sum of Bond

We, Principal and Surety are bound unto the Obligee, in the sum of \$_____, for the payment of which the we hereby jointly and severally bind ourselves, our respective successors and assigns, and legal representatives.

Obligation

[Select appropriate alternative:]

[For payment of account:]

WHEREAS the Obligee has agreed with the Principal on _____ *[date]*, to sell and deliver to the Principal *[merchandise or describe]* and the principal has agreed to pay therefor;

[OR, for loan or debt:]

WHEREAS the Principal is indebted to the Obligee in the sum of \$_____, which is due and payable on _____ *[date]*, with interest from _____ *[date]*, at the rate of _____ percent per annum;

[OR, for a lease of real property:]

WHEREAS on _____ *[date]*, the Obligee has leased the property described as _____ *[description and address]* to the Principal for a term of _____ beginning on _____ *[date]*, with rental payable in the amount of \$_____ per *[e.g., month or year]*, which Lease, and all of the documents attached to or forming a part of that Lease (hereinafter designated as "Lease"), are hereby referred to and incorporated by reference;

Condition of Obligation

NOW THEREFORE, the condition of this obligation is such that if the Principal performs _____[his or her or its] obligation to _____[*statement of the underlying obligation undertaken by the principal*], then this obligation shall be void; but otherwise this obligation shall remain in full force [, subject to the following condition[s]: _____].

CONDITIONS

[Include as appropriate:]

Substituted Performance

Whenever Principal is in default of _____[his or her or its] obligations, under the [*specify underlying agreement, e.g., lease*], Surety may remedy that default, assume the obligations under the [*specify underlying agreement, e.g., lease*] [, or obtain another complete Principal's performance under the _____ (*specify underlying agreement, e.g., lease*)], and thereafter the Surety shall be subrogated to all the rights of the Principal in connection with said obligations.

Effect of Obligor's Default

If the Obligor is in substantial default of any of _____[his or her or its] obligations provided by the [*specify underlying agreement, e.g., lease*], the Surety shall be relieved from all liability hereunder.

Modification of Obligation

If the Principal and Obligor make any substantial modification of the underlying agreement or any modification which increases the risk to the Surety, the Surety shall not be liable for the changed obligations [and shall be exonerated from all liability under this bond], unless notice of the modification has been given to the Surety and the Surety has not disapproved the modification, or unless the modifications do not extend beyond [*describe permissible limit of modifications*]. [However, the liability of the Surety shall not be discharged or affected by any extension of time given to the Principal by the Obligor.]

Exclusion of Liability

The Surety shall not be liable for the nonperformance of any obligation which is attributable to [*e.g., fire, riot, terrorist act, strike, the elements or other acts of God, or for any loss or damage resulting therefrom*].

No Benefit to Third Parties

No right of action shall accrue on this bond to or for the use of any person, firm, or corporation other than the Obligor, or Obligor's [business] successors.

Termination

The Surety shall [not] have the right to terminate its liability hereunder [at any time by giving written notice to the Obligee, but notice of termination shall not limit or terminate this agreement in respect to _____ (description of obligation) which may have arisen prior to (the expiration of 30 days from) the receipt of the notice by the Obligee.]

[Use the following provision when there is more than one surety and the liability of each is to be limited in dollar amount or to a proportionate share of the loss:]

Pro Rata Liability

None of the Sureties shall be liable to pay a larger amount than _____ [e.g., \$ _____] together with _____ [his or her or its] proportionate share of any interest due or _____ [his or her or its] proportionate share of the total liability accruing] by virtue of this obligation.

[Use the following provision when there is more than one surety:]

Joinder of Parties

The Obligee shall have the right to proceed hereunder against any or all of the Sureties, jointly or severally, with or without joining the Principal in any proceeding.

[Continue with the following:]

Legal Actions

No suit, action, or proceeding hereunder shall be brought against the Surety by reason of the default of the Principal, until after the expiration of [e.g., 30 days] after default, and in no event more than [e.g., one year] after default.

Notice of Default

In the event of default by the Principal, notice of that default shall be [e.g., mailed by the Obligee to the Surety by registered mail not later than 15 days after the default].

Surety Released If Principal Not Liable

Both the Principal and the Surety shall be released with respect to any liability under this bond on the occurrence of any event which would have the effect of releasing the Principal from liability with respect to the underlying obligation.

IN WITNESS WHEREOF, the Principal and Surety have executed and delivered this bond on _____ [date].

_____ [signature of principal], Principal

_____ [typed name]
[By _____ (typed name and title, if applicable)]
_____ [signature of surety], Surety
_____ [typed name]
[By _____ (typed name and title, if applicable)]

Legal Topics:

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

Civil Procedure Remedies Bonds General Overview Civil Procedure Remedies Bonds Sureties General Overview Civil
Procedure Remedies Bonds Sureties Procedures



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27-79 California Legal Forms--Transaction Guide § 79.205

§ 79.205 Bond of Discount Buying Organization [Form SFSB-408-2]

[1] Comment

[a] Use of Form

The form in [2], below, contains the text of the surety bond form approved by the Attorney General [see 11 Cal. Code Reg. §§ 25(b), 63.5] for use by a discount buying organization to furnish the bond required of it by Civ. Code § 1812.103. The official form is published by the Secretary of State's Office as Form SFSB-408-2 and may be obtained in a variety of ways, including downloading from the Business Portal-Business Programs Division Forms page of the Secretary of State's website, which is located at http://www.ss.ca.gov/business/bpd_forms.htm. Affiliate discount buying organizations and their parents may choose to comply with special bond requirements under which the affiliate posts a \$250,000 bond and the parent a \$2,500,000 bond [see Civ. Code § 1812.117], in which case Secretary of State Form SFSB 408 (not illustrated), also available from the Secretary of State's website as described above, must be used in lieu of the form illustrated here.

There are many exceptions to the definition of discount buying organization that will make the bond requirement inapplicable, including exceptions based on the organization charging a one-time or annual fee below a specified amount and/or establishing and maintaining the \$50,000 escrow account in accordance with Civ. Code § 1812.101(a)(2)(B)(ii)(I) [see Civ. Code § 1812.100(a) (definition of discount buying organization)]. Every discount buying organization, as defined in Civ. Code § 1812.100(a), is required to maintain a bond issued by a surety company admitted to do business in California in the principal sum of \$20,000 [Civ. Code § 1812.103] or to make a deposit in lieu of the bond [Civ. Code § 1812.105].

The bond required by Civ. Code § 1812.103 is in favor of the State of California, but it is for the benefit of any person who is damaged by any violation of Civ. Code §§ 1812.100-1812.129 or by fraud or dishonesty or failure to provide the services of the discount buying organization in performance of any of its contracts. The surety on a bond for a discount buying organization is liable only for the actual damages suffered, plus restitution, but not the treble damages permitted under Civ. Code § 1812.123(a) [Civ. Code § 1812.104]. The term of the bond may not be less than 24 months [2 Cal. Code Reg. § 21902; see also Code Civ. Proc. § 995.440; Condition 1 (continuous form for license and permit bonds)].

For discussion of discount buying organizations and forms for complaints relating to them, see *California Forms of Pleading and Practice*, Ch. 128, *Consumer Contracts: Statutes Regulating Specific Types of Contracts* (Matthew Bender).

[b] Filing and Fees

A copy of the bond must be filed with the Secretary of State [*Civ. Code* § 1812.103]. The executed document and a filing fees of \$30.00 must be sent to the California Secretary of State, P.O. Box 942877, Sacramento, CA 94277-0001. There is no filing fee for an amendment to a previously filed bond.

[2] FORM

Bond of Discount Buying Organization [Form SFSB-408]

[Click here to view image.](#)

Legal Topics:

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

Civil Procedure Remedies Bonds General Overview Civil Procedure Remedies Bonds Sureties Procedures



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A. License, Permit, and Miscellaneous Bonds

27-79 California Legal Forms--Transaction Guide § 79.206

§ 79.206 Bond of Commercial Fundraiser for Charitable Purposes [Form CT-4CF]

[1] Comment--Use of Form

The form in [2], below, contains the text of the surety bond form approved by the Attorney General for use by an entity registering as a commercial fundraiser for charitable purposes. Each application for registration or renewal of registration as a commercial fundraiser for charitable purposes [*see Gov. Code § 12599(b)* (registration)] must be accompanied by a cash deposit or by a bond issued by an admitted surety in favor of the State of California and in a form acceptable to the Attorney General. The cash deposit or bond must be in the amount of \$25,000 and is for the benefit of any person damaged as a result of malfeasance or misfeasance in the conduct of the activities specified in *Gov. Code § 12599(a)*. The bond may be in the form of a rider to a larger blanket liability bond [*Gov. Code § 12599.5*].

The official form is published by the Attorney General's office as Form CT-4CF and may be obtained in a variety of ways. It will be provided as part of the registration packet for commercial fundraiser from the California Department of Justice, 1300 I Street, P.O. Box 903447, Sacramento, CA 94203-4470. It also may be downloaded from the charities page of the Attorney General's web site, which is located at <http://ag.ca.gov/>.

A commercial fundraiser for charitable purposes must register as such before soliciting any funds, assets, or property in California for charitable purposes [*Gov. Code § 12599(b)*]. The activities that constitute commercial fundraising for charitable purposes, when engaged in for compensation, whether by an individual, corporation, or other legal entity, are the following [*Gov. Code § 12599(a)*]:

- Soliciting funds, assets, or property in California for charitable purposes.
- Receiving or controlling the funds, assets, or property solicited for charitable purposes as a result of a solicitation of funds, assets, or property in California for charitable purposes.
- Employing, procuring, or engaging any compensated person to solicit, receive or control funds, assets or property for charitable purposes.

- Obtaining a majority of ones inventory for resale from an organization qualified to solicit donations pursuant to *Welf. & Inst. Code § 148.3*.

Persons who solicit charitable donations for compensation must disclose that fact at the time of each solicitation, stating the name by which they or their employer is registered with the Attorney General as a commercial fundraiser [*Bus. & Prof. Code § 17510.85*]. A commercial fundraiser also must disclose on request (written or oral) its percentage of total fundraising expenses. "Percentage of total fundraising expenses" means the ratio of total expenses of the fundraiser to the total revenues received by the fundraiser for the charitable purpose for which the funds are being solicited as reported on the most recent report filed with the Attorney General. Failure to make this disclosure is grounds for an injunction prohibiting further solicitation [*Gov. Code § 12599(j)*].

For discussion and transaction guide regarding the registration and reporting requirements for commercial fundraisers, see *Ch. 13, Nonprofit Corporations*, §§ 13.36[3] and 13.142.

[2] FORM

Bond of Commercial Fundraiser for Charitable Purposes [Form ct-4-CF]

[Click here to view image.](#)

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil Procedure Remedies Bonds General Overview



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A. License, Permit, and Miscellaneous Bonds

27-79 California Legal Forms--Transaction Guide § 79.207

§ 79.207 Bond of Seller [BOE-445]

[1] Comment--Use of Form

The form in [2], below, contains the text of the surety bond form approved by the Attorney General [*see 11 Cal. Code Reg. §§ 25(b), 40.1*] for use by one holding or applying for a seller's permit to secure his or her obligation for sales (or transaction) and use taxes [*see Rev. & Tax. Code § 6701*]. The official form, as illustrated here, is published by the Board of Equalization as Form BOE-445, but the form must be issued by a company admitted to do business as a surety in California. Most admitted sureties will use their own form of this bond.

The SBE may require a seller to deposit security if it is necessary to insure payment of sales and use taxes [*Rev. & Tax. Code § 6701*]. *Rev & Tax Code § 6701* does not mention a bond explicitly, but refers to "any security that the board may determine." The SBE fixes the amount of the security subject to specified maximum amounts. For taxpayers filing returns for quarterly periods, that maximum is the lesser of twice the seller's average liability or \$50,000. For taxpayers filing returns for monthly periods, that maximum is the lesser of three times the seller's average liability or \$50,000. Different maximum amounts apply if SBE has revoked the seller's permit [*Rev. & Tax. Code § 6701*].

The SBE must release the security after a three-year period in which the permittee has filed all returns and paid all tax to the state or any amount of tax required to be collected and paid to the state within the time required [*Rev. & Tax. Code § 6701*].

The surety and its principal, the taxpayer, may contract for any commencement date for the surety's bond covering payment of sales and use tax [*see Condition 5*], which date will govern, even if the particular bond is not executed by the principal or delivered to the SBE until after that stated effective date [*see People v. Great American Ins. Co. (1973) 222 Cal. App. 2d 552, 556-557, 35 Cal. Rptr. 267* (bond stated to be effective on April 1st, executed by surety on April 1st, but not executed by principal or forwarded to SBE until April 17th nonetheless effective on April 1st)]. Due process does not require that the SBE give notice of the taxpayer's default to the surety, even if notice would allow the surety to minimize its exposure by paying the tax before any penalty could accrue [*American Fidelity Fire Ins. Co. v. State Bd. of Equalization (1973) 34 Cal. App. 3d 51, 55-56, 109 Cal. Rptr. 545*]. Thus, the surety should require, in another

agreement, that the taxpayer give it immediate notice of any default [see *Civ. Code* §§ 2807-2808 (discussed in § 79.15; surety generally liable without notice of principal's default)].

For discussion of seller's permits and returns, see *Ch. 1E, Taxation of Business*, §§ 1E.65-1E.66, *Ch. 2A, Incorporating a Going Business*, § 2A.131.

[2] FORM

Bond of Seller [BOE-445]

[Click here to view image.](#)

Legal Topics:

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

Civil Procedure Remedies Bonds Sureties General Overview Contracts Law Types of Contracts Guaranty Contracts



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A. License, Permit, and Miscellaneous Bonds

27-79 California Legal Forms--Transaction Guide § 79.208

§ 79.208 Miscellaneous Indemnity Bond**[1] Comment--Use of Form**

The form in [2], *below*, is an example of an indemnity bond for use in a situation in which the principal will be handling money and other property (tickets, in the example used below) belonging to the obligee/creditor. The surety agrees to indemnify the obligee against the failure of the principal to faithfully account to the obligee.

The bond form in [2], *below*, requires the obligee to give the surety written notice of any claim as soon as possible, but not later than 15 days after the obligee becomes aware a claim under the bond, and to furnish proof of the loss within two months of the discovery (First Condition). The bond establishes its own limitation period, subject to any applicable law (Second and Third Conditions), provides that the surety's liability is not cumulative, but if obligee's losses exceed the amount of the bond, obligee may have proceeds of other protections, such as security and insurance (Fourth and Fifth Conditions), and sets forth the term of the bond (Seventh Condition). The bond is terminable at the option of either the surety or the obligee, on giving notice as specified in the Sixth Condition.

An admitted surety is likely to have its own indemnity bond form for use in similar situations, and to require that its form be used. If the bond is executed by personal sureties, the description of the surety in the preamble of the form in [2], *below*, will have to be modified to reflect that fact, as will the description in the signature line, and the bond will have to be accompanied by an affidavit or declaration of qualifications of each personal surety [*Code Civ. Proc.* § 995.520(a)]. For a form for a declaration of qualifications of a personal surety, see § 79.201[2].

[2] FORM**Miscellaneous Indemnity Bond****Miscellaneous Indemnity Bond**

KNOW ALL PERSONS BY THESE PRESENTS, that _____ [I or we], _____ [name of principal(s)], _____ [address(es)], as Principal, and _____ [name of surety], a

corporation, incorporated under the laws of the State of _____, and authorized by the laws of the State of _____ to execute bonds and undertakings as sole surety, as Surety, are held and firmly bound to _____ [name of obligee], with offices at _____ [address], hereinafter called the Obligee, in an amount not to exceed the sum of \$ _____, for the payment whereof, well and truly to be made, the Principal and Surety bind themselves, their heirs, administrators, successors, and assigns, jointly and severally, firmly by these presents.

WHEREAS, the Obligee has agreed to appoint said Principal a [e.g., Commission Agent] of said Obligee; and

WHEREAS, a condition of that agreement is that the Principal shall provide a good and sufficient indemnity bond to indemnify the Obligee against failure of the Principal to faithfully account for all sums of money, as well as [e.g., ticket stock], belonging to Obligee and held in trust for it by the Principal, as provided in the [e.g., Commission Agency Sales] agreement;

NOW, THEREFORE, the condition of this obligation is such that if the above bounden Principal shall indemnify the Obligee against failure of the Principal to faithfully account for all sums of money, as well as [e.g., ticket stock], belonging to Obligee and held in trust for it by the Principal, as provided in the [e.g., Commission Agency Sales] agreement, then this obligation shall be null and void; otherwise to remain in full force and effect; subject, however, to the following conditions, which conditions shall be conditions precedent to recovery hereunder:

First: At the earliest practical moment, and in any event not later than 15 days after discovery by the Obligee of any act or acts that would cause a claim to be made under the terms of this bond, the Obligee shall give the Surety written notice of the act or acts, which notice shall be mailed to the following address: _____; and within two months after that discovery shall file with the Surety affirmative proof of loss, itemized and duly sworn to, and shall on request of the Surety render every assistance, not pecuniary, to facilitate the investigation and adjustment of any loss.

Second: Any suit or action to recover against the Surety on account of loss hereunder shall be brought before the expiration of 12 months from the discovery of that loss, but shall not be instituted before the expiration of 2 months from the filing of proof as stated above. No suit, action, or proceeding by the Obligee to recover on this bond shall be sustained unless the same be commenced within 6 months from the termination of the [e.g., Commission Agency Sales] agreement between the Obligee and the Principal.

Third: If any limitation in this bond for giving notice, filing proof or bringing suit is prohibited or made void by any law controlling the construction of this bond, that limitation shall be deemed to be amended so as to be equal to the minimum period of limitation permitted by the applicable law.

Fourth: Regardless of the number of years this bond shall continue in force and the number of premiums which shall be payable or paid, the liability of the Surety hereunder shall be noncumulative.

Fifth: If the Obligee shall sustain any loss or losses covered by this bond which exceed the amount of coverage provided hereunder, the Obligee shall be entitled to all recoveries, except from suretyship, insurance, reinsurance, security, and indemnity taken by or for the benefit of the surety, by whomsoever made, on account of those loss or losses under this bond until fully reimbursed, less the actual cost of effecting the same; and any remainder shall be applied to the reimbursement of the Surety.

Sixth: This bond may be canceled either by the Surety or the Obligee by written notice served on the other, or sent by registered mail and specifying therein the effective date of cancellation, provided, however, that if notice is served or sent by the Surety, the effective date shall be not less than 30 days after service or after the date borne by the sender's registry receipt.

Seventh: The term of this bond shall be from the _____ day of _____, [month, year]
to and including the _____ day of _____, [month, year].

SIGNED AND DATED this _____ day of _____, _____.

PRINCIPAL

_____ [name of principal]
_____ [signature]

SURETY

_____ [name of surety]
By _____ [signature]
[typed name and title]
Premium: \$ _____

Legal Topics:

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

Civil Procedure Remedies Bonds General Overview Contracts Law Contract Conditions & Provisions Indemnity



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DIVISION V: CONTRACTS AND OBLIGATIONS
CHAPTER 79 SURETYSHIP, GUARANTY, AND INDEMNITY
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A. License, Permit, and Miscellaneous Bonds

27-79 California Legal Forms--Transaction Guide §§ 79.209-79.219

[Reserved]

§§ 79.209[Reserved]



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DIVISION V: CONTRACTS AND OBLIGATIONS
CHAPTER 79 SURETYSHIP, GUARANTY, AND INDEMNITY
PART IV. FORMS
B. Public Official Bonds

27-79 California Legal Forms--Transaction Guide § 79.220

§ 79.220 Public Official Bond--Unconditional

[1] Comment

[a] Use of Form

The form in [2], below, is for use to bond a public official for the faithful performance of his or her official duties [see *Gov. Code* §§ 1450-1563]. Laws that require public officers and employees to furnish bonds to state and local agencies are common. The main risk involved is loss caused by the dishonesty of the official. The bond covers all official duties, as provided by law, of the office. The condition, that the principal/official "will well, truly, and faithfully perform all official duties then required of him or her by law, and also all such additional duties as may be imposed on him or her by any existing law of the State of California or law enacted subsequently to the execution of the bond," is required by *Gov. Code* §§ 1501, 1504(b) [see also *Gov. Code* §§ 1560-1563 (public entity that pays premium for bond)]. The form in [2], below, also includes the optional language, for use when that is one of the principal's official duties, obligating the principal and surety for the principal's the proper handling of any public funds in his or her possession.

Most admitted sureties will have their own public official bond form, which they will require be used. If deemed expedient by the appointing authority, a master official bond or other form of master bond may be used to provide coverage on more than one officer, employee, or agent who is required by the appointing power or the board of supervisors to give a bond [see *Gov. Code* § 1481 (applicable to bonds required other than by statute)].

[b] Obligations of Public Official Bonds

All official bonds are to be made payable to the State of California in the amount and with the conditions required by *Gov. Code* §§ 1500-1504 or the law creating or regulating the duties of the office [*Gov. Code* § 1500]. However, liability on a bond to the State of California may be enforced by or for the benefit of, and in the name of, any and all persons for whose benefit the bond is given who are damaged by breach of the condition of the bond [*Code Civ. Proc.* § 995.850(a); see § 79.64].

Besides the primary condition set forth in *Gov. Code* § 1501, every official bond executed by any officer pursuant to

law obligates the principal and sureties for any and all breaches of the conditions the official's duties committed during the time the official continues to discharge any of the duties of or hold the office, and in some cases whether those breaches are committed or suffered by the principal officer, or a deputy, or clerk. Limits on liability for acts of subordinate officers do not apply if the principal failed to exercise due care in the selection appointment, or supervision of that deputy or employee, or negligently failed to suspend or secure the discharge of that deputy or employee after knowledge or notice of his or her inefficiency or incompetency [*see Gov. Code § 1504(a); Fernelius v. Pierce (1943) 22 Cal. 2d 226, 228, 138 P.2d 12* (decided under prior law; causes of action on bond of city manager and police chief were stated based on their failure to initiate proceedings to dismiss police officers they knew were unfit and vicious who fatally beat prisoner)].

In addition, whenever any special penalty, forfeiture, or liability is imposed on any officer of a county or judicial district, other than in a criminal prosecution, for nonperformance or malperformance of official duties, the liability therefor attaches to the official bond of the officer, and to the principal and sureties on the bond [*Gov. Code § 1505*].

[c] Approval of Public Official Bonds

The approval of every official bond must be indorsed and signed by the officer approving the bond can file the bond until it has been approved [*Gov. Code § 1452*]. Unless otherwise provided, the official bonds of state officers prescribed by law must be approved by either the Governor or the Director of General Services [*Gov. Code § 1454*]. Unless otherwise provided, the official bonds of officers of a county and judicial district must be approved by the presiding judge of the superior court [*Gov. Code § 1457*], as must the bonds, and the sureties on the bonds, of supervisors, treasurers, county clerks, auditors, sheriffs, tax collectors, district attorneys, recorders, assessors, surveyors, superintendents of schools, public administrators, and coroners [*Gov. Code §§ 1458, 1531*]. The officer whose duty it is to approve official bonds required of officers of a county or judicial district not named in *Gov. Code § 1458* must not accept or approve any bond unless the affidavit of each of the personal sureties on the bond contains a statement that the surety is a resident, and either an owner of real property or householder, within the county or within an adjoining county [*Gov. Code § 1530*].

A member of the board of supervisors cannot act as surety on the official bond of any officer of a county or judicial district of his or her county. The sheriff, county clerk, tax collector, treasurer, recorder, auditor, assessor, or district attorney of the same county can not become sureties on official bonds for each other [*Gov. Code § 1532*].

[d] Recording and Filing of Public Official Bonds

Unless otherwise provided, the official bonds of state officers prescribed by law must be filed and recorded in the office of the Secretary of State [*Gov. Code § 1454; see Gov. Code § 1453* (official bonds to be recorded in book kept for that purpose entitled "Record of Official Bonds"); *Gov. Code § 1456* (official bond of Secretary of State to be file in office of Treasurer)]. Unless otherwise provided, all official bonds of state officers and employees not expressly prescribed by law must be forwarded to the Department of General Services for recordation. After recordation the Department of General Services must forward the bonds to the Secretary of State where they are filed [*Gov. Code § 1455*].

Unless otherwise provided, the official bonds of officers of a county and judicial district are to be recorded in the office of the county recorder, and then filed in the county clerk's office [*Gov. Code § 1457; see Gov. Code § 1459* (official bond of county clerk to be filed in office of county treasurer)].

Every officer with whom official bonds are filed must carefully keep and preserve the bonds [*Gov. Code § 1460*] during the term of office for which the bond was issued and for one year following the expiration of that term. After one year following the term of the office for which the bond was issued, the bond may be destroyed or otherwise disposed of [*Gov. Code § 1461*].

[e] Obtaining Copies of Public Official Bonds

Every officer with whom official bonds are filed must give certified copies of the bonds to any person demanding copies, on being paid the same fees as are allowed by law for certified copies of papers in other cases [*Gov. Code* § 1460].

[2] FORM

Public Official Bond--Unconditional
PUBLIC OFFICIAL BOND--UNCONDITIONAL

Recording requested by _____)
 _____ [name])
 When recorded mail to _____)
 _____ [name])
 _____ [address])
 _____ [city, state, zip])
 _____)

 Space above this line for recorder's use

The fee charged for this bond is \$_____ per annum.

KNOW ALL PERSONS BY THESE PRESENTS:

WHEREAS, _____ [name and address of principal] (hereinafter called "Principal") has been duly [appointed or elected] to the office of _____ for a term of _____ year[s] beginning on the _____ day of [month and year] and ending on the _____ day of [month and year]; and

WHEREAS, [set forth statute or ordinance that requires bond] requires the holder of the above-named office to furnish a bond made payable to _____ [specify obligee, e.g., the State of California] in the sum of \$_____;

NOW, THEREFORE, we, Principal, and _____ [name(s), address(es), and status, if relevant of surety or sureties, e.g., ABC Insurance, a corporation organized and existing under the laws of the State of _____ and duly authorized to transact business as a general surety in the State of California, with its principal office at _____ (address)] as Surety, are held and firmly bound unto _____ [specify obligee, e.g., the State of California] in the sum of \$_____, in lawful money of the United States, for payment of which we bind ourselves, our heirs, executors, administrators, successors, and assigns, jointly and severally, firmly by these presents.

THE CONDITION OF THE ABOVE OBLIGATION IS SUCH that if the Principal shall well, truly, and faithfully perform all official duties now required of him or her by law, and also all additional duties that may be imposed on him or her by any existing law of the State of California or any law enacted subsequently to the execution of this bond[, and shall pay over and account as required by law for all funds coming into his or her hands by virtue of that office], then this obligation shall be void. Otherwise, it shall remain in full force and effect.

IN WITNESS WHEREOF Principal and [Surety or Sureties] have executed this instrument on _____ [date].

PRINCIPAL

_____ [signature of principal]
 [typed name and title, if applicable]

SURETY

_____ [signature of surety]
 _____ [typed name]

[By _____ (typed name and title, if applicable)]

SURETY

_____ [signature of surety]
 _____ [typed name]

[By _____ (typed name and title, if applicable)]

Acknowledgment

[See § 79.200[2].]

This bond is approved.

_____ [signature of approving officer]
 _____ [typed name and title of approving officer]

Legal Topics:

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

Civil Procedure Remedies Bonds General Overview Governments Federal Government Employees & Officials Governments State & Territorial Governments Employees & Officials



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27-79 California Legal Forms--Transaction Guide § 79.221

§ 79.221 Public Official Bond--Alternative Form

[1] Comment--Use of Form

The form in [2], below, is for use to bond a public official for the faithful performance of his or her official duties [see *Gov. Code §§ 1450-1563*]. It differs from the bond form in § 79.220[2] in the following ways:

- It includes as named obligees officers and employees of the public entity that is obligee [see *Fernelius v. Pierce* (1943) 22 Cal. 2d 226, 242, 138 P.2d 12 (language of bond at issue therein)].
- It includes indemnity language.
- It specifies the laws and/or regulations and ordinances which required its issuance and incorporates those provisions [see Condition 2]. For discussion of the provisions of *Gov. Code §§ 1450-1563*, see § 79.220[1].
- It recites that the surety's aggregate liability is limited to the amount of the bond [see Condition 3].
- It recites that the surety may cancel the bond in accordance with the Bond and Undertaking Law (*Code Civ. Proc. § 995.010 et seq.*) [see Condition 4].

The laws and rules of the governmental unit involved must be consulted to determine if, and under what circumstances, particular terms and conditions of a public official bond are acceptable. In order to determine the amount to be stated in the bond, the law requiring the bond must be consulted. For discussion of other aspects of public official bonds, such as their approval, recording, and filing, see § 79.200[1][b]-[e].

Most admitted sureties will have their own public official bond forms and will require that those forms be used.

[2] Form

Public Official Bond--Alternative Form
PUBLIC OFFICIAL BOND

Recording requested by _____)
 _____ [name])
 When recorded mail to _____)
 _____ [name])
 _____ [address])
 _____ [city, state, zip])
 _____)

 Space above this line for recorder's use

The fee charged for this bond is \$_____ per annum.

KNOW ALL PERSONS BY THESE PRESENTS:

WHEREAS, _____ [name and address of principal] (hereinafter called "Principal") has been duly [appointed or elected] to the office of _____ for a term of _____ year[s] beginning on the _____ day of [month and year] and ending on the _____ day of [month and year]; and

WHEREAS, [set forth statute or ordinance that requires bond] requires the holder of the above-named office to furnish a bond made payable to _____ [specify obligee, e.g., the City of Oakland] in the sum of \$_____;

NOW, THEREFORE, we, Principal, and _____ [name(s), address(es), and status, if relevant of surety or sureties, e.g., ABC Insurance, a corporation organized and existing under the laws of the State of _____ and duly authorized to transact business as a general surety in the State of California, with its principal office at _____ (address)] as Surety, are held and firmly bound unto _____ [specify obligee, e.g., the City of Oakland], its officers and employees, and the successors of interest of any of them, in the sum of \$_____, in lawful money of the United States, for payment of which we bind ourselves, our heirs, executors, administrators, successors, and assigns, jointly and severally, firmly by these presents.

THE CONDITION OF THE ABOVE OBLIGATION IS SUCH that if the Principal shall indemnify and hold harmless the _____ [specify obligee, e.g., City of Oakland] and/or its officers and employees as their respective interests may appear, against any loss occasioned by the failure on the part of the Principal to well, truly, and faithfully perform all official duties that are now or may hereafter be required of [him or her] by any law of the State of California and/or [ordinance and/or regulation] of the _____ [specify obligee, e.g., City of Oakland] and/or required by the _____ [specify obligee's senior official, e.g., the City Manager] or other chief official or department head, and shall pay over and account as required by law for all funds coming into _____ [his or her] hands by virtue of that office, then this obligation shall be void. Otherwise, it shall remain in full force and effect, subject, however, to the following Conditions:

1. This bond shall be deemed continuous in form and shall remain in full force and effect for all liabilities of Principal incurred before, and for acts, omissions, or causes existing or which arose before, the cancellation or withdrawal of the Surety from the bond.

2. This bond is executed by Surety to comply with the provisions of [*specify law, regulation, or ordinance requiring bond*] [and Chapter 3 (commencing with *Section 1450, Title 1, Division 4, of the California Government Code*)] and is subject to all of the terms and provisions thereof.

3. The aggregate liability of the Surety hereunder on all claims shall not exceed the sum of this bond.

4. Surety may cancel this bond in accordance with the provisions of *Section 996.310 et seq. of the California Code of Civil Procedure*.

IN WITNESS WHEREOF Principal and [Surety or Sureties] have executed this instrument on _____ [date].

PRINCIPAL

_____ [signature of principal]
[typed name and title, if applicable]

SURETY

_____ [signature of surety]
_____ [typed name]
[By _____ (typed name and title, if applicable)]

SURETY

_____ [signature of surety]
_____ [typed name]
[By _____ (typed name and title, if applicable)]

Acknowledgment

[See § 79.200[2].]

This bond is approved.

_____ [signature of approving officer]
_____, _____ [typed name and title of approving officer]

Legal Topics:

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

Civil Procedure Remedies Bonds General Overview Governments State & Territorial Governments Employees & Officials



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27-79 California Legal Forms--Transaction Guide § 79.222

§ 79.222 Public Official Bond--Conditional**[1] Comment--Use of Form**

The form in [2], below, is for use to bond a public official for the faithful performance of his or her official duties [see *Gov. Code* §§ 1450-1563]. It is conditional and may be used only if the applicable law or ordinance permits conditions and limitations on the liability of the surety. In particular, the form in [2], below, provides for the situation in which a public official is serving in successive terms of office. An unconditional bond form would cause the surety to be liable for any shortage in funds turned over to the principal's successor in office even though the shortage occurred in a prior term of office when the bond was not in effect, because an unconditional bond protects against all required official acts, one of which is to turn over the proper amount of funds to the successor. The form in [2], below, specifies that it does not cover loss arising out of acts committed before its effective date and does not cover shortages of funds that existed before the effective date of the bond [see Condition 2]. Various other conditions are included, some of which are implied in law [see, e.g., Condition 5, *Code Civ. Proc.* § 996.310 *et seq.* (surety's right to cancel bond governed by Bond and Undertaking Law)].

The laws and rules of the governmental unit involved must be consulted to determine if, and under what circumstances, particular terms and conditions of a public official bond are acceptable. In order to determine the amount to be stated in the bond, the law requiring the bond must be consulted. For discussion of other aspects of public official bonds, such as their approval, recording, and filing, see § 79.200[1][b]-[e].

Most admitted sureties will have their own public official bond forms and will require that those forms be used.

[2] Form

Public Official Bond-Conditional
Public Official Bond-Conditional

Recording requested by _____ [name])
)
)

When recorded mail to _____)
 _____ [name])
 _____ [address])
 _____ [city, state, zip])
 _____)

 Space above this line for recorder's use

The fee charged for this bond is \$_____ per annum.

KNOW ALL PERSONS BY THESE PRESENTS:

That we _____ [name and address of principal] (hereinafter called "Principal"), as Principal, and _____ [name(s), address(es), and status, if relevant of surety or sureties, e.g., ABC Insurance, a corporation organized and existing under the laws of the State of _____ and duly authorized to transact business as a general surety in the State of California, with its principal office at _____ (address)], as Surety, are held and firmly bound unto [specify obligee], as Obligee, in the amount of \$_____ to the payment of which, the Principal binds himself or herself, his or her heirs, and personal representatives, and the Surety binds itself, its successors, and assigns, jointly and severally, firmly by these presents.

WHEREAS, the Principal has been duly [elected or appointed] to the [office or position] of _____ and is furnishing this bond for the period beginning _____ [date], and terminating on _____ [date];

NOW, THEREFORE, THE CONDITION OF THIS OBLIGATION IS SUCH that if the Principal shall, during the effective period of this bond, well, truly and faithfully perform all official duties that are now or may hereafter be required of [him or her] by any law of the State of California, and account for and pay over as required by law all funds coming into _____ [his or her] possession by virtue of _____ [his or her] office or position, then this obligation shall be void; otherwise it shall remain in full force and effect, subject, however, to the following further conditions, which shall be conditions precedent to recovery hereunder.

1. This bond is effective for the period beginning _____ [date], and is continuous from its inception to its termination, as provided in Condition 5 below.
2. This bond does not cover (a) loss arising out of any acts or omissions occurring prior to its effective date; (b) any shortage of funds or property existing prior to that effective date, nor funds or property applied to any such shortage; (c) loss arising out of the failure, suspension, or restricted operation of any bank or banks, depository or depositories, any law, decision, or ordinance to the contrary notwithstanding; or (d) loss arising out of the Principal's failure to collect taxes.
3. The amount of this bond as above set forth is the Surety's maximum aggregate liability hereunder, and neither the duration of the coverage nor the basis on which premiums are computed shall render that amount cumulative.
4. On discovery by the Obligee of any fact or circumstance indicating a possible claim hereunder, immediate written notice of the matter, containing all details then known, shall be given to the Surety at its principal office.
5. All liability of the Surety hereunder for future acts and omissions of the Principal shall terminate at the end of the period shown in the Whereas clause above, unless terminated earlier on the happening of any of the following events:

(a) discovery by the Obligee of any dishonest act or omission of the Principal; or (b) the Principal ceasing to occupy the office or position above set forth; or (c) the giving of written notice by the Surety of the Surety's election to terminate, which notice shall be effective 30 days after its receipt.

Principal and [Surety or Sureties] have executed this instrument on

_____ [date].

PRINCIPAL

_____ [signature of principal]

[typed name and title, if applicable]

SURETY

_____ [signature of surety]

_____ [typed name]

[By _____ (typed name and title, if applicable)]

SURETY

_____ [signature of surety]

_____ [typed name]

[By _____ (typed name and title, if applicable)]

Acknowledgment

[See § 79.200[2].]

Legal Topics:

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

Civil Procedure Remedies Bonds General Overview Governments State & Territorial Governments Employees & Officials



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27-79 California Legal Forms--Transaction Guide §§ 79.223-79.229

[Reserved]

§§ 79.223[Reserved]



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C. Lost Instrument or Security Bonds

27-79 California Legal Forms--Transaction Guide § 79.230

§ 79.230 Lost Securities Bond

[1] Comment

[a] Use of Form

The form in [2], *below*, is for use to support an owner's request to the issuer to replace specified securities that have been mislaid, lost, stolen, or destroyed and cannot be found. The surety agrees to protect the issuer against all loss which might result from issuing a duplicate security to the principal. Bonding companies may require use of their bond form. They are also likely to have a specific form for application for the bond and to require the principal to enter into an indemnity agreement for their benefit should they be required to expend money or incur expenses as surety [*see Civ. Code §§ 2847-2850* (surety's rights against principal, discussed in § 79.18)].

[b] Issuer Required to Replace Certificated Security

If an owner of a certificated security, whether in registered or bearer form, claims that the certificate has been lost, destroyed, or wrongfully taken, the issuer must issue a new certificate if the owner does all of the following [*Com. Code § 8405(a)*; *see also Corp. Code § 419* (similar requirements and cause of action if issuer refuses to replace lost instrument)]:

- Requests the new certificate before the issuer has notice that the certificate has been acquired by a protected purchaser.
- Files with the issuer a sufficient indemnity bond.
- Satisfies other reasonable requirements imposed by the issuer.

If a protected purchaser of the original certificate presents it for registration of transfer after the issue of a new security certificate, the issuer must register that transfer unless to do so would result in an overissue. In that case, the issuer's liability is governed by *Com. Code § 8210* [*Com. Code § 8405(b)*]. In addition to any rights on the indemnity bond, an

issuer may recover the new certificate from a person to whom it was issued or any person taking under that person, except a protected purchaser [Com. Code § 8405(b)].

[2] FORM

Lost Securities Bond

LOST SECURITIES BOND

KNOW ALL PERSONS BY THESE PRESENTS:

WHEREAS _____ [name of principal] as Principal (hereinafter called "Principal") is the owner of record of [describe lost security, e.g., certificate No. 18, issued on March 4, 1993, for 100 common shares, of the par value of \$100 each] of _____ [name of issuer], a corporation duly organized under the laws of the State of _____, (hereinafter called "Corporation"); and

WHEREAS Principal represents that the [describe lost security, e.g., certificate representing those shares] is lost, stolen, or destroyed and that he/she does not know its present whereabouts or condition; and

WHEREAS Principal has requested the Corporation to issue a new [describe security, e.g. certificate] to [him or her] for [those or that] [e.g., shares] in lieu of the lost [describe, e.g., certificate];

NOW, THEREFORE, we, Principal and _____ [name, address, and status, if relevant, of surety, e.g., ABC Indemnity, a corporation duly organized under the laws of the State of _____, having its principal office at _____ (address), and authorized to transact a general surety business in the State of California], as Surety (hereinafter called "Surety"), are held and firmly bound to Corporation, its successors, and assigns in the sum of \$_____ to the payment of which to the Corporation, its successors, and assigns we do, by these presents, jointly and severally, bind ourselves, our heirs, executors, and administrators, legal representatives, successors, and assigns.

THE CONDITION OF THIS OBLIGATION IS SUCH THAT if Principal or Principal's heirs, executors, administrators, legal representatives, successors, or assigns pay or cause to be paid to Corporation, its successors and assigns all damages sustained by Corporation by reason or growing out of the issuance and registration of the new [describe lost security, e.g. certificate] to Principal; indemnify and save harmless the Corporation, its successors and assigns from all damages, expenses, demands, and causes of action arising out of the issuance and registration of the new [describe security, e.g. share certificate]; and deliver or cause to be delivered to the Corporation the missing [describe lost security, e.g. certificate] for cancellation as soon as it is found, this obligation shall be void; otherwise this obligation shall remain in full force and effect.

SIGNED and SEALED this _____ day of _____, [month and year].

PRINCIPAL

_____ [signature of principal]
[typed name and title, if applicable]

SURETY

_____ [signature of surety]
_____ [typed name]

[By _____ (typed name and title, if applicable)]

Acknowledgment

[See § 79.200[2].]

Legal Topics:

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

Civil Procedure Remedies Bonds General Overview Securities Law Blue Sky Laws Bonds & Debentures



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 C. Lost Instrument or Security Bonds

27-79 California Legal Forms--Transaction Guide § 79.231

§ 79.231 Lost Note Bond**[1] Comment--Use of Form**

The form in [2], below, is for use to support a maker's request to the payee for indemnity when a promissory note has been, or is about to be, paid in full and the payee cannot surrender or cancel the note because it has been mislaid, lost, stolen, or destroyed and cannot be found. The bracketed language is for use if the note in question is secured by a deed of trust. The bond need be recorded only if it is used in connection with a deed of trust [see *Civ. Code* § 2941(b)(1) (original of note and deed of trust to be delivered by beneficiary to trustee when requesting reconveyance); *Civ. Code* § 2941(b)(1)(D) (when electronic copy suffices as electronic original)].

An obligor is not required to pay an instrument to a person, other than a holder in due course, seeking enforcement of the instrument if the obligor proves that the instrument is lost or stolen [*Com. Code* § 3305(c)].

For discussion and forms for declaration and notice for use in a related procedure in accordance with *Civ. Code* § 2941.7 (missing or uncooperative beneficiary or mortgagee), see Ch. 25C, *Release and Reconveyance*, §§ 25C.122, 25C.210-25C.213.

[2] FORM

Lost Note Bond
LOST NOTE BOND

	)
Recording requested by	)
_____ [name]	)
When recorded mail to	)
_____ [name]	)
_____ [address]	)
_____ [city, state, zip]	)
	)

Space above this line for recorder's use

KNOW ALL PERSONS BY THESE PRESENTS:

WHEREAS on _____[*date*], _____[*name of obligee/maker*] (hereinafter called "Obligee") made _____[*his or her or its*] promissory note in the amount of \$ _____ payable _____[*specify maturity, e.g., three years after date*] to the order of _____[*name of payee/principal*] (hereinafter called "Principal"), and bearing interest at the rate of _____ percent per annum [*if note is secured by deed of trust, continue: and a deed of trust to secure payment of that note. The deed of trust is on real property described _____ (therein or as follows: _____). _____ (name, address, and status if relevant) is trustee under the deed of trust, which was recorded on _____ (date), as Instrument No. _____ in Book _____, Page _____, Official Records of _____ County, California;* and

WHEREAS Principal alleges that the promissory note [and deed of trust] [has or have] been lost or destroyed, and cannot be found and that Principal does not know [its or their] present whereabouts or condition; and

[*EITHER*]

WHEREAS, Principal has requested Obligee to make payment of the debt which was evidenced by the promissory note and Obligee is willing to comply with the foregoing request if Principal delivers to Obligee a bond in the sum of \$ _____ plus _____ percent interest on the bond from this date, as indemnity against any claim that may be made against Obligee on account of the promissory note [and records or causes to be recorded a reconveyance of the deed of trust];

[*OR*]

WHEREAS, the note has been paid[, both as to interest and principal] [, and Obligee desires and requests the deed of trust be released and reconveyed];

NOW, THEREFORE, we, Principal and _____[*name, address, and status, if relevant, of surety, e.g., ABC Indemnity, a corporation duly organized under the laws of the State of _____, having its principal office at _____ (address), and authorized to transact a general surety business in the State of California*], as Surety (hereinafter called "Surety"), are held and firmly bound to Obligee and Obligee's successors and assigns in the sum of \$[with interest thereon from _____(*date*) at the rate of _____ percent per annum] to the payment of which to the Obligee and Obligee's successors and assigns we do, by these presents, jointly and severally, bind ourselves, our heirs, executors, and administrators, legal representatives, successors, and assigns.

THE CONDITION OF THIS OBLIGATION IS SUCH THAT if Principal or Principal's executors, administrators, legal representatives, successors, or assigns pay or causes to be paid to Obligee or Obligee's successors and assigns all damages sustained by Obligee by reason or arising from the promissory note, indemnifies and saves harmless the Principal and the Principal's successors and assigns from all demands, claims, actions, losses, liabilities, damages, and expenses arising from the promissory note; and delivers or causes to be delivered to the Principal the missing

promissory note for cancellation as soon as it is found, this obligation shall be void; otherwise this obligation shall remain in full force and effect.

SIGNED and SEALED this _____ day of _____, *[month and year]*.

PRINCIPAL

_____ *[signature of principal]*
[typed name and title, if applicable]

SURETY

_____ *[signature of surety]*
_____ *[typed name]*

[By _____ *(typed name and title, if applicable)*]

Acknowledgment

[See § 79.200[2].]

Legal Topics:

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

Civil Procedure Remedies Bonds General Overview Contracts Law Negotiable Instruments General Overview



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C. Lost Instrument or Security Bonds

27-79 California Legal Forms--Transaction Guide §§ 79.232-79.239

[Reserved]

§§ 79.232[Reserved]



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DIVISION V: CONTRACTS AND OBLIGATIONS
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27-79 California Legal Forms--Transaction Guide § 79.240

§ 79.240 Bid Bond

[1] Comment--Use of Form

The form in [2], *below*, is a contractor's bid bond. A bid bond is used to assure that the contractor will enter into a construction contract in accordance with his or her bid if that bid is accepted. A bid bond is usually one alternative specified by the owner, along with a certified or cashier's check, to secure the contractor's execution of the contract and furnishing of performance and payment bonds [see §§ 30B.200, 30D.201 (forms for invitation to bid)] if that contractor's bid is the successful one. The amount of the bond is typically 10 percent of the bid. Although bid bonds may be a condition of bids for private construction projects, they are required in connection with public works projects [see *Pub. Contract Code* § 10167; *California Real Estate Law and Practice*, Ch. 422, *Insurance and Bonding Practices*, § 422.05[9] (Matthew Bender)]. For the bid bond form required in connection with a California state project, see § 90A.205[2]. For the bid bond form required in connection with a federal project, see § 90B.231[2].

The terms of the bid bond in [2], *below*, require that the contractor enter into a contract in accordance with the terms of the bid and give the bonds specified in invitation to bid or contract, usually a performance bond and a payment (labor and material) bond [see §§ 79.241-79.243 (performance bonds); §§ 79.244-79.246 (payment bonds)]. If the contractor fails to enter into a contract or to provide those bonds, the measure of damages is the difference between the defaulting contractor's bid and the price at which the owner contracts with another party to perform the work.

Most admitted sureties will have their own form of bid bond, which they will require be used. A surety that agrees to issue a bid bond will usually also issue the necessary performance and payment bonds. However, the surety issuing the bid bond usually reserves the right not to issue the final performance and payment bonds under the contract.

[2] Form

Bid Bond

BID BOND

KNOW ALL PERSONS BY THESE PRESENTS:

WHEREAS, [name and address of contractor] (hereafter designated as "Principal"), is submitting herewith to _____ [name and address of owner] (hereafter designated as "Owner") a bid, in accordance with plans and specifications previously supplied by Owner, to construct a [describe, e.g., 15-unit apartment building] on the property known as [address or legal description];

NOW THEREFORE, we, the Principal and _____ and _____ [name(s), address(es), and status, if relevant of surety or sureties, e.g., ABC Insurance, a corporation duly organized under the laws of the State of _____, having its principal office at _____ (address), and authorized to transact a general surety business in the State of California] as Surety, are held and firmly bound unto Owner in the sum of \$_____, lawful money of the United States of America for the payment of which sum Principal and Surety hereby jointly and severally bind ourselves, our respective heirs, executors, administrators, successors, and assigns.

THE CONDITION OF THIS OBLIGATION IS SUCH that if Owner accepts Principal's bid, and Principal [, within 20 days of acceptance,] executes a contract and furnishes the bond[s] specified in the bidding or contract documents, or pays to Owner any cost of obtaining another to perform the work specified in the bid which exceeds the amount of Principal's bid, not to exceed the amount of this bond, this obligation shall be void; but otherwise this obligation shall remain in full force and effect.

IN WITNESS WHEREOF two identical counterparts of this instrument, each of which shall for all purposes be deemed an original, have been duly executed by the above Principal and [Surety or Sureties] on _____ [date].

PRINCIPAL

_____ [signature of principal]

_____ [typed name]

[By _____ (typed name and title, if applicable)]

SURETY

_____ [signature of surety]

_____ [typed name]

[By _____ (typed name and title, if applicable)]

SURETY

_____ [signature of surety]

_____ [typed name]

[By _____ (typed name and title, if applicable)]

Acknowledgment

[See § 79.200[2] .]

Legal Topics:

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

Civil Procedure Remedies Bonds General Overview Contracts Law Types of Contracts Construction Contracts Public Contracts Law Bids & Formation General Overview Public Contracts Law Bids & Formation Subcontracts & Subcontractors Surety Bonds



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27-79 California Legal Forms--Transaction Guide § 79.241

§ 79.241 Performance Bond

[1] Comment

[a] Use of Form

The form in [2], *below*, is a performance bond, to be issued by one or more personal sureties or admitted surety insurers, to guarantee the general contractor's performance under a construction contract. Most admitted sureties will have their own performance bond forms, and will require that those forms be used.

Performance bonds are routinely required in construction contracts. The performance bond guarantees that a contractor will faithfully perform a specified contract in accordance with its terms. This form also specifically guarantees that performance will be prompt [*see Cates Construction, Inc. v. Talbot Partners (1999) 21 Cal. 4th 28, 39-41, 86 Cal. Rptr. 2d 855, 980 P.2d 407* (performance bond that guaranteed prompt performance, construed with related construction contract, permitted recovery of damages for delay)].

For discussion of the liability of a surety for liquidated damages under a construction contract performance bond, see § 79.15. For discussion of all types of bonds issued in connection with construction projects see, *California Real Estate Law and Practice, Ch. 422, Insurance and Bonding Practices, § 422.05* (Matthew Bender). For detailed discussion of construction contracts, see Ch. 30D, *Construction Contracts and Subcontracts* and Ch 31, *Mechanics' Liens* . Construction financing is discussed in Ch. 30A, *Construction Financing* .

For a form for a performance bond to secure a subdivider's performance of its obligation to construct subdivision improvements in accordance with the Subdivision Map Act (*Gov. Code § 66410 et seq.*), see, *Ch. 30, Subdivision Regulation, § 30.201[2]*. For the performance bond required to be used in connection with a federal project, see *Ch. 90B, Federal Government Contracts, § 90B.232[2]*

[b] Terms of Bond

If the contractor defaults in performance, the form in [2], *below*, gives the surety three options:

- Promptly remedy the default;
- Assume and complete the contract in accordance with its terms and conditions; or
- Obtain another to complete the contract.

By the terms of the performance bond in [2], *below*, the surety is relieved of liability if the owner is in default of the underlying contract or if the contractor's inability to perform is caused by acts of God or specified others causes [see Conditions 2 and 4]. In addition [see Condition 3], the surety must be informed of and consent to any modification of the underlying contract that, together with other modifications, increases the cost of the construction by more than 10 percent [see *Civ. Code* § 2819, discussed in § 79.17; *but see Civ. Code* § 2824 (surety who has been indemnified by principal, remains liable to creditor to extent of indemnity notwithstanding modification of underlying obligation)]. Some bonds allow modification without the surety's notification or consent or specifically waive notice to the surety of extensions of time given to complete the contract.

The performance bond in [2], *below*, specifies that the owner has the sole right of action on the bond [see Condition 5]. This is to distinguish it from a payment bond or a bond for labor and materials which is for the benefit of anyone who provides labor or materials to the project [see *Civ. Code* § 3096 (payment bond defined)]. However, a performance bond that states, or incorporates a contract that states, that the contractor will pay the claims of all persons performing labor or furnishing materials binds the surety for labor performed and materials furnished even in the absence of a separate payment bond, will inure to the benefit of those persons [see *Culbertson v. Cizek* (1964) 225 Cal. App. 2d 451, 466-467, 37 Cal. Rptr. 548] .

The performance bond in [2], *below*, also provides that any action on the bond must be instituted within two years from the date the work is completed [see Condition 6; *Civ. Code* § 3096 (defining "completion" of work of improvement for purposes of mechanics lien law)]. The statute of limitation for an action on a surety bond conditioned on performance of the principal is the same as the statute of limitations with respect to the obligations of the principal, other than the obligations of the principal under the bond, unless the terms of the bond provide otherwise [*Code Civ. Proc.* § 359.5]. In the case of a performance bond, the parties can provide for a shorter limitation period for action on the bond so long as the time allowed is reasonable [*Jew v. Pacific Employers Ins. Co.* (1961) 196 Cal. App. 2d 310, 315, 16 Cal. Rptr. 542 ; compare *Civ. Code* §§ 3239, 3240 (in payment bond, period cannot be shortened to less than six months, and bond must be recorded); see also *Code Civ. Proc.* § 360.5 (waiver of statute of limitations must be in writing and signed by obligated party)].

[2] FORM

Performance Bond

PERFORMANCE BOND

KNOW ALL PERSONS BY THESE PRESENTS:

WHEREAS, [name and address of contractor] (hereafter designated as "Principal"), has, by written agreement dated _____, contracted with _____ [name and address of owner] (hereafter designated as "Owner") to erect a [describe, e.g., 15-unit apartment building] on the property known as [address or legal description], which Agreement, and all of the Contract Documents attached to or forming a part of that Agreement (hereinafter designated as "Contract"), are hereby referred to and incorporated by reference;

NOW THEREFORE, we, the Principal, and _____ and _____ [name(s), address(es),

and status, if relevant of surety or sureties, e.g., ABC Insurance, a corporation duly organized under the laws of the State of _____, having its principal office at _____ (address), and authorized to transact a general surety business in the State of California] as Surety, are held and firmly bound unto Owner in the sum of \$_____, lawful money of the United States of America for the payment of which sum Principal and Surety hereby jointly and severally bind ourselves, our respective heirs, executors, administrators, successors, and assigns.

THE CONDITION OF THIS OBLIGATION IS SUCH that if the Principal promptly and faithfully performs all the covenants and conditions of the Contract on its part, then this obligation shall be void; but otherwise this obligation shall remain in full force, subject, however, to the following conditions:

1. Whenever the Principal shall be, and shall be declared by the Owner to be, in default under the Contract, the Surety may promptly remedy the default, or, in the alternative, shall have the option to assume and complete the Contract in accordance with its terms and conditions, or to obtain another to complete the Contract, and thereafter the Surety or that other person shall be subrogated to all the rights of the Principal under the Contract.
2. If the Owner defaults in the performance of any material covenant or condition on its part to be performed under the Contract, the Surety shall be relieved from all liability hereunder.
3. If the Principal and the Owner agree on any modifications in the terms of the Contract, or in the drawings and specifications mentioned therein, the Principal shall immediately and prior to the commencement of work designed to put that modification into effect, give notice to the Surety stating the nature and amount of the modification; and the Surety shall have the right in its absolute discretion to disapprove any modification which would, collectively with other modifications not specifically approved by the Surety, increase the contract cost of constructing the building by more than 10 percent.
4. The Surety shall not be liable for the nonperformance of any of the terms of the Contract attributable to fire, riot, strike, the elements or other acts of God, or for any loss or damage resulting therefrom.
5. No right of action shall accrue on this bond to or for the use of any person, firm, or corporation other than the Owner, or its business successors.
6. No suit, action, or proceeding shall be maintained under this bond unless commenced within two years after the completion of the work.

IN WITNESS WHEREOF two identical counterparts of this instrument, each of which shall for all purposes be deemed an original, have been duly executed by the above Principal and [Surety or Sureties] on _____[date].

PRINCIPAL

_____ [signature of principal]
 _____ [typed name]
 [By _____ (typed name and title, if applicable)]

SURETY

_____ [signature of surety]
 _____ [typed name]
 [By _____ (typed name and title, if applicable)]

SURETY

_____ [signature of surety]
 _____ [typed name]
 [By _____ (typed name and title, if applicable)]

Acknowledgment

[See § 79.200[2].]

Legal Topics:

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

Civil Procedure Remedies Bonds General Overview Public Contracts Law Terminations Performance Bonds



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27-79 California Legal Forms--Transaction Guide § 79.242

§ 79.242 Performance Bond--Short Form**[1] Comment--Use of Form**

The form in [2], below, is a performance bond, to be issued by one or more personal sureties or admitted surety insurers, to guarantee a principal's (obligor's) performance under a contract. It does not have any of the specific provisions that appear in the bond in § 79.241[2], such as those giving the surety an election in the event of principal's default, requiring notices of modification, reciting that only the obligee has rights under the bond, or establishing a shorter limitations period than that provided by statute for bringing an action on the bond [see § 79.241[1][b]].

This form does specifically guarantee that performance will be prompt [see *Cates Construction, Inc. v. Talbot Partners* (1999) 21 Cal. 4th 28, 39-41, 86 Cal. Rptr. 2d 855, 980 P.2d 407 (performance bond that guaranteed prompt performance, construed with related construction contract, permitted recovery of damages for delay)]. It also has optional language waiving the surety's right to notice of any modifications or extensions of the underlying contract [see Civ. Code §§ 2824, 2819; discussion in § 79.17].

Most admitted sureties will have their own performance bond forms, and will require that those forms be used.

[2] FORM**Performance Bond--Short Form****PERFORMANCE BOND**

KNOW ALL PERSONS BY THESE PRESENTS:

WHEREAS, _____[name and address of obligor] (hereafter designated as "Principal"), has, by written agreement dated _____, contracted with _____[name and address of obligee] (hereafter designated as "Obligee") to [describe particulars of contract], which Agreement [, and all related documents attached to or forming a part of that Agreement] (hereinafter designated as "Contract"), are hereby referred to and

incorporated by reference;

NOW THEREFORE, we, the Principal and _____ and _____ *[name(s), address(es), and status, if relevant of surety or sureties, e.g. ABC Insurance, a corporation duly organized under the laws of the State of _____, having its principal office at _____ (address), and authorized to transact a general surety business in the State of California]* as Surety, are held and firmly bound unto Obligee in the sum of \$ _____, lawful money of the United States of America for the payment of which sum Principal and Surety hereby jointly and severally bind ourselves, our respective heirs, executors, administrators, successors, and assigns.

THE CONDITION OF THIS OBLIGATION IS SUCH that if the Principal promptly and faithfully performs all the covenants and conditions of the Contract [and any modifications thereof, notice of which is waived by Surety,] [during the original term of the Contract or any extensions of that term granted by Obligee], then this obligation shall be void; but otherwise this obligation shall remain in full force.

IN WITNESS WHEREOF two identical counterparts of this instrument, each of which shall for all purposes be deemed an original, have been duly executed by the above Principal and [Surety or Sureties] on _____ *[date]*.

PRINCIPAL

_____ *[signature of principal]*

_____ *[typed name]*

[By _____ *(typed name and title, if applicable)*]

SURETY

_____ *[signature of surety]*

_____ *[typed name]*

[By _____ *(typed name and title, if applicable)*]

SURETY

_____ *[signature of surety]*

_____ *[typed name]*

[By _____ *(typed name and title, if applicable)*]

Legal Topics:

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

Civil Procedure Remedies Bonds General Overview Civil Procedure Remedies Bonds Sureties General Overview Public Contracts Law Terminations Performance Bonds



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27-79 California Legal Forms--Transaction Guide § 79.243

§ 79.243 Performance Bond--Dual Obligees

[1] Comment--Use of Form

The form in [2], below, is a performance bond, to be issued by one or more personal sureties or admitted surety insurers, to guarantee a principal's (obligor's) performance under a contract to both the owner and the construction lender. It contains the same specific provisions as the bond in § 79.241[2] [see Conditions 1, 3, 4, 7 (surety's election in the event of principal's default, requiring notices of modification, relieving surety from liability for fires, acts of God, etc., and establishing a shorter limitations period than that provided by statute for bringing an action on the bond); see also § 79.241[1][b]] and adds the lender to the conditions relieving surety of liability during owner's default [see Condition 2] and reciting that only the obligees have rights under the bond [see Condition 6]. The preambles specify that the principal/contractor is a third-party beneficiary of the construction loan agreement between owner and lender.

In private contracts in which the owner has arranged to secure a construction loan, the lender often requires that it be named as a joint obligee on the construction bond [see § 30A.02 for an illustrative form for a construction loan agreement)]. This does not add to the liability of the surety. However, this type of bond often expressly states that the lender will have no greater rights under the bond than the owner of the property [see Condition 5].

Most admitted sureties will have their own performance bond forms and possibly dual obligee endorsements, and will require that their forms be used.

For discussion of all types of bonds issued in connection with construction projects see, California Real Estate Law and Practice, Ch. 422, *Insurance and Bonding Practices* (Matthew Bender). For detailed discussion of construction contracts, see Ch. 30D, *Construction Contracts and Subcontracts*. Construction financing is discussed in Ch. 30A, *Construction Financing*.

[2] FORM

Performance Bond--Dual Obligees

PERFORMANCE BOND

KNOW ALL PERSONS BY THESE PRESENTS:

WHEREAS, [name and address of contractor] (hereafter designated as "Principal"), has, by written agreement dated _____, contracted with _____ [name and address of owner] (hereafter designated as "Owner") to erect a [describe, e.g., 15-unit apartment building] on the property known as [address or legal description], which Agreement, and all of the Contract Documents attached to or forming a part of that Agreement (hereinafter designated as "Contract"), are hereby referred to and incorporated by reference; and

WHEREAS, _____ [name and address of lender] (hereafter designated as "Lender") has agreed to lend the Owner a sum of money to be secured by a mortgage on the project to be used in making payments under the Contract, and desires protection as its interests may appear, if Contractor defaults under the Contract. That protection shall be subject to the performance by either or both obligees of the obligations to Contractor, either in connection with the Contract or as a third party beneficiary under the loan agreement between Lender and Owner;

NOW THEREFORE, we, the Principal and _____ and _____ [name(s), address(es), and status, if relevant of surety or sureties, e.g. ABC Insurance, a corporation duly organized under the laws of the State of _____], having its principal office at _____ (address), and authorized to transact a general surety business in the State of California] as Surety, are held and firmly bound unto Owner and Lender, their successors and assigns, as their respective interests may appear, as Obligees, in the sum of \$ _____, lawful money of the United States of America, for the payment of which sum Principal and Surety hereby jointly and severally bind ourselves, our respective heirs, executors, administrators, successors, and assigns.

THE CONDITION OF THIS OBLIGATION IS SUCH that if the Principal promptly and faithfully performs all the covenants and conditions of the Contract on its part, then this obligation shall be void; but otherwise this obligation shall remain in full force, subject, however, to the following conditions:

1. Whenever the Principal shall be, and shall be declared by the Owner to be, in default under the Contract, the Surety may promptly remedy the default, or, in the alternative, shall have the option to assume and complete the Contract in accordance with its terms and conditions, or to obtain another to complete the Contract, and thereafter the Surety or that other person shall be subrogated to all the rights of the Principal under the Contract.
2. If the Owner and Lender, or either of them, defaults in the performance of any material covenant or condition on its part to be performed under the Contract, the Surety shall be relieved from all liability hereunder.
3. If the Principal and the Owner agree on any modifications in the terms of the Contract, or in the drawings and specifications mentioned therein, the Principal shall immediately and prior to the commencement of work designed to put that modification into effect, give notice to the Surety stating the nature and amount of the modification; and the Surety shall have the right in its absolute discretion to disapprove any modification which would, collectively with other modifications not specifically approved by the Surety, increase the contract cost of constructing the building by more than 10 percent.
4. The Surety shall not be liable for the nonperformance of any of the terms of the Contract attributable to fire, riot, strike, the elements or other acts of God, or for any loss or damage resulting therefrom.
5. The aggregate liability of Surety hereunder, to Owner and Lender, as their interests may appear, is limited to the sum of this bond. Surety, at its option, may make any payments hereunder by check payable jointly to Owner and Lender
6. No right of action shall accrue on this bond to or for the use of any person, firm, or corporation other than the Owner

and Lender, or the business successors of either of them.

7. No suit, action, or proceeding shall be maintained under this bond unless commenced within two years after the of completion of the work.

IN WITNESS WHEREOF two identical counterparts of this instrument, each of which shall for all purposes be deemed an original, have been duly executed by the above Principal and [Surety or Sureties] on _____[date].

PRINCIPAL

_____ [signature of principal]

_____ [typed name]

[By _____ (typed name and title, if applicable)]

SURETY

_____ [signature of surety]

_____ [typed name]

[By _____ (typed name and title, if applicable)]

SURETY

_____ [signature of surety]

_____ [typed name]

[By _____ (typed name and title, if applicable)]

Legal Topics:

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

Civil Procedure Remedies Bonds General Overview Civil Procedure Remedies Bonds Sureties General Overview Public Contracts Law Terminations Performance Bonds



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27-79 California Legal Forms--Transaction Guide § 79.244

§ 79.244 Labor and Materials Payment Bond--Private Work

[1] Comment

[a] Use of Form

The form in [2], below, is a labor and materials payment bond, to be issued by one or more personal sureties or admitted surety insurers, to guarantee payment by the contractor of all who provide labor on or furnish materials in connection with a private construction contract [see *Civ. Code* §§ 3110, 3111, 3112 (those entitled to lien)]. The bond and statute give these persons the right to recover on the bond in any suit brought to foreclose the liens provided for in the Mechanics' Lien Law [*Civ. Code* § 3082 *et seq.*; see Ch. 31, *Mechanics' Liens*] or in a separate suit brought on the bond [see *Civ. Code* § 3096]. While a payment bond is not required by statute in connection with a private work, the agreement between the owner and the contractor customarily requires the contractor to furnish a payment bond. Most admitted sureties will have their own forms of payment bond which they will require be used.

For a payment bond for use in connection with a public work, see § 31.240[2]. For a payment bond issued in favor of a governmental agency to secure a subdivider's performance of its obligation to pay contractors, subcontractors, and persons who furnish labor, materials, or equipment in connection with the construction of off-site improvements to a subdivision, see Ch. 30, *Subdivision Regulation*, § 30.202[2]. For the payment bond required in connection with a federal project, see § 90B.233[2]. For an alternative form for a payment bond, naming the owner as obligee, see § 79.245[2]. For a payment bond naming owner and construction lender as dual obligees, see §§ 79.246[2].

The form in [2], below, refers to some of the detailed statutory provisions of California law relating to the liens obtained by persons furnishing labor or materials in connection with construction contracts. A lien is a charge imposed on specific property by which it is made security for the performance of an act [*Code Civ. Proc.* § 1180]. The contractor who agrees with the owner to enter into a construction contract is entitled to a lien against the property on which construction is made [*Civ. Code* § 3109 *et seq.*]. Laborers of every class and material suppliers are entitled to a lien on the property involved for the value of labor done or materials furnished [*Civ. Code* §§ 3110, 3111, 3112]. The Civil Code provides the method of filing liens and applicable time limits. Certain time periods run from the date of completion of the contract [see *Civ. Code* § 3086, set forth in [b], below].

For discussion of all types of bonds issued in connection with construction projects, see *California Real Estate Law and Practice*, Ch. 422, *Insurance and Bonding Practices*, § 422.05 (Matthew Bender). For detailed discussion of mechanics' liens, see Ch 31, *Mechanics' Liens* . For detailed discussion of construction contracts, see Ch. 30D, *Construction Contracts and Subcontracts* .

[b] Definitions in California Mechanics' Lien Law

As used in California's Mechanics' Lien Law (*Civ. Code § 3082 et seq.*), "Payment bond" means a bond with good and sufficient sureties that is conditioned for the payment in full of the claims of all claimants, and that also by its terms is made to inure to the benefit of all claimants so as to give these persons a right of action to recover on this bond in any suit brought to foreclose the liens provided for in the Mechanics Lien Law or in a separate suit brought on the bond. An owner, original contractor, or a subcontractor may be the principal on any payment bond [*Civ. Code § 3096*].

"Claimant" means any person entitled under the Mechanics' Lien Law to record a claim of lien, to give a stop notice in connection with any work of improvement, or to recover on any payment bond, or any combination of the foregoing [*Civ. Code § 3085*].

An "original contractor" is any contractor who has a direct contractual relationship with the owner [*Civ. Code § 3095*]; and a "subcontractor" is any contractor who has no direct contractual relationship with the owner [*Civ. Code § 3104*].

"Completion" in the case of a private work means the time when any of the following occur [*Civ. Code § 3086*]:

- The work it is actually completed.
- The owner or owner's agent occupies or uses the work and labor on it has ceased.
- The owner or owner's agent accepts the work.
- After the commencement of a work of improvement, labor has ceased for 60 continuous days.
- After the commencement of a work of improvement, labor has ceased for 30 or more continuous days and the owner has recorded a notice of cessation

[c] Prohibited Provisions

Payment bonds are construed most strongly against the surety and in favor of the persons for whose benefit the bonds are written [*Civ. Code § 3226*]. Changes in an underlying construction agreement will not release a surety from liability under a bond or undertaking for the payment of laborers or material suppliers [*Civ. Code § 3225*], nor will any of the following [*Civ. Code § 3225*]:

- A change or alteration in, or modification of, any contract, plans, specifications, or agreement relating to any scheme or work of improvement, or relating to the furnishing of labor, materials, or equipment for that work [*but see Civ. Code § 3123(c)* (owner must notify the prime contractor and construction lenders of any changes in contract if that change increases price stated in contract by 5 percent or more)].
- A change or modification of any terms of payment, or extension of the time for any payment relating to any scheme or work of improvement.

- A rescission or attempted rescission of the contract, agreement, or bond.
- Any conditions precedent or subsequent in the bond attempting to limit the right of recovery to which claimants are otherwise entitled under the contractor agreement or under the bond.
- Any fraud practiced by any person other than the claimant seeking to recover on the bond, if the bond is given for the benefit of claimants.
- A breach of the contract between the owner and the original contractor, or a breach by any other obligee named in the bond.

With respect to the last item listed above, a provision in a payment bond that purports to release the surety from liability if the owner is in default (for example, has not made progress payments to the contractor as provided in their agreement), or the so-called "pay if paid" provision, which conditions the contractor's obligation to pay others on the contractor's receipt of payment from the owner, is void [*Wm. R. Clarke Corp. v. Safeco Ins. Co. of America* (1997) 15 Cal. 4th 882, 886, 888, 890, 893-897, 64 Cal. Rptr. 2d 578, 938 P.2d 372] .

[d] Recording

There are two important reasons for recording a payment bond:

- To restrict the owner's liability to the contract price [see *Civ. Code* § 3236 (intent of *Civ. Code* § 3235 is to limit owner's liability to contract price)].
- To validate a provision requiring actions on the bond to be commenced within a shorter period than the four-year period provided by *Civ. Code* § 337 [see [e], below].

Recordation of a payment bond may also preserve the priority of mortgages or deeds of trust, as specified in *Civ. Code* §§ 3137, 3139

If the original contract for a private work of improvement is filed with the county recorder before the work commences, and the payment bond of the original contractor in an amount not less than 50 percent of the contract price is recorded in the same office, any recovery under lien claims will be restricted to an aggregate amount equal to that due from the owner to the original contractor, and the original contractor and sureties will be liable on the bond for any deficiency between that amount and the whole amount found to be due to the claimants [*Civ. Code* § 3235]. *Civ. Code* § 3235 thus protects the owner if the contractor incurs liability to subcontractors and material suppliers in excess of the contract price.

[e] Time for Commencing Action on Bond

Generally, an action on a bond must be commenced within four years from the date the cause of action accrues [see *Code Civ. Proc.* § 337; see also *Code Civ. Proc.* § 359.5, discussed in § 79.241[1][b]]. However, the parties can agree to shorter limitation period for action on the bond as long as the time allowed is reasonable [*Jew v. Pacific Employers Ins. Co.* (1961) 196 Cal. App. 2d 310, 315, 16 Cal. Rptr. 542] . In the case of a payment bond, the parties may not limit the time for commencement of actions to a period shorter than six months from the completion of the work specified in the construction contract. In addition, for any provision attempting to limit the period for the commencement of actions on the payment bond to be valid insofar as actions brought by claimants are concerned, the bond must be recorded, before the work of improvement is commenced, with the county recorder of the county in which the property referred to therein is situated [see *Civ. Code* § 3239; *Civ. Code* § 3086 (set forth in [b], above, defining completion); see also *Progress Glass Co. v. American Ins. Co.* (1980) 100 Cal. App. 3d 720, 725, 161 Cal. Rptr. 243] . Notwithstanding *Civ.*

Code § 3239, if the surety on the payment bond records the payment bond in the office of the county recorder of the county in which the property is situated before the work of improvement is *completed*, any action against the surety or sureties must be commenced not later than six months after the completion of the work of improvement [*Civ. Code § 3240*].

The form in [2], *below*, contains a provision requiring that any action on the bond be commenced within six months from the date of completion.

[f] Notice Prior to Commencement of Action on Bond

In order to enforce a claim against a payment bond given in connection with a private work, the contract for which was entered into on or after January 1, 1995, the claimant must give the same 20-day preliminary notice that is required as a prerequisite to establishing a mechanics' lien or stop notice [*Civ. Code § 3242(a)*], or if no preliminary notice was given, the claimant must give written notice of his or her claim to the surety and the bond principal within 15 days after a notice of completion has been recorded. If no notice of completion is recorded, the claimant must give written notice to the surety and bond principal within 75 days after completion of the work of improvement [*Civ. Code § 3242(b)*; see *Civ. Code § 3086* (set forth in [b], *above*, defining completion)]. The written notice to the surety and bond principal must include the following information [*Civ. Code § 3227(b)*]:

- The kind of labor, services, equipment, or materials furnished or agreed to be furnished by the claimant.
- The name of the person to or for whom the labor, services, equipment, or materials were furnished.
- The amount in value, as near as may be determined, of any labor, services, equipment, or materials already furnished or to be furnished.

The notice may be personally delivered or deposited in the mail, postage prepaid, certified or registered, and addressed as provided in *Civ. Code § 3227(a)*. For a form for notice of claim to be served by a claimant on the surety as a prerequisite to commencement of an action on the bond, see § 31.241[2].

[2] Form

Labor and Materials Payment Bond--Private Work

PAYMENT BOND--PRIVATE WORK

	)
Recording requested by	)
_____ [name]	)
When recorded mail to	)
_____ [name]	)
_____ [address]	)
_____ [city, state, zip]	)
	)

Space above this line for recorder's use

The fee charged for this bond is \$_____ per annum.

KNOW ALL PERSONS BY THESE PRESENTS:

WHEREAS, [name and address of contractor] (hereafter designated as "Principal"), by written agreement dated _____, has contracted with _____ [name and address of owner] (hereafter designated as "Owner") to erect a [describe, e.g., 15-unit apartment building] on the property known as [address or legal description], which Agreement, and all of the Contract Documents attached to or forming a part of that Agreement (hereinafter designated as "Contract"), are hereby referred to and incorporated by reference;

NOW THEREFORE, we, the Principal and _____ and _____ [name(s), address(es), and status, if relevant of surety or sureties, e.g., ABC Insurance, a corporation duly organized under the laws of the State of _____, having its principal office at _____ (address), and authorized to transact a general surety business in the State of California] as Surety, are held and firmly bound unto any and all persons who perform labor on or bestow skill or other necessary services on, or furnish materials or lease equipment to be used or consumed in, or furnish appliances, teams, or power contributing to the work described in the Contract in the sum of \$_____, lawful money of the United States of America for the payment of which sum Principal and Surety hereby jointly and severally bind ourselves, our respective heirs, executors, administrators, successors, and assigns.

THE CONDITION OF THIS OBLIGATION IS SUCH that if the Principal shall pay, or cause to be paid in full, the claims of all persons performing labor on or bestowing skill or other necessary services on, or furnishing materials or leasing equipment to be used or consumed in or furnishing appliances, teams or power contributing to the work described in the Contract, then this obligation shall be void; otherwise it shall remain in full force and effect.

The is a payment bond as defined in *California Civil Code Section 3096* and is given to comply with Title 15, Part 4., Division 3 of the California Civil Code.

No right of action shall accrue on this bond to or for the use of any person, firm, or corporation other than those specified in *California Civil Code Sections 3110, 3111, and 3112*, or the business successors of any of them.

The aggregate liability of Surety hereunder is limited to the sum of this bond.

No suit, action, or proceeding shall be maintained under this bond unless commenced within six months years after the of completion of the work, as defined in *California Civil Code Section 3086* and unless claimant has given notice to Surety as required by *California Civil Code Section 3242*.

IN WITNESS WHEREOF two identical counterparts of this instrument, each of which shall for all purposes be deemed an original, have been duly executed by the above Principal and [Surety or Sureties] on _____[date].

PRINCIPAL

_____ [signature of principal]
 _____ [typed name]
 [By _____ (typed name and title, if applicable)]

SURETY

_____ [signature of surety]
 _____ [typed name]
 [By _____ (typed name and title, if applicable)]

SURETY

_____ [signature of surety]
 _____ [typed name]
 [By _____ (typed name and title, if applicable)]

Acknowledgment

[See § 79.200[2].]

Legal Topics:

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

Civil Procedure Remedies Bonds General Overview Civil Procedure Remedies Bonds Sureties General Overview Contracts
Law Types of Contracts Construction Contracts Public Contracts Law Terminations Performance Bonds



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DIVISION V: CONTRACTS AND OBLIGATIONS
 CHAPTER 79 SURETYSHIP, GUARANTY, AND INDEMNITY
 PART IV. FORMS
 D. Construction Contract Bonds

27-79 California Legal Forms--Transaction Guide § 79.245

§ 79.245 Labor and Materials Payment Bond--Private Work--Alternate Form**[1] Comment--Use of Form**

The form in [2], below, is a labor and materials payment bond, to be issued by one or more personal sureties or admitted surety insurers, to guarantee payment by the contractor of all who provide labor on or furnish materials in connection with a private construction contract [see *Civ. Code* §§ 3110, 3111, 3112 (those entitled to lien)]. It differs from the bond form in § 79.244[2] in that the owner is named as obligee and it fully sets forth some of the applicable statutory provisions [see, e.g., *Civ. Code* §§ 3225, 3226, 3227(a), 3242, discussed in § 79.244[1]].

For a form for a payment bond naming owner and construction lender as dual obligees, see §§ 79.246[2].

Most admitted sureties will have their own payment bond forms and will require that those forms be used.

[2] FORM**Labor and Materials Payment Bond--Private Work--Alternate Form****PAYMENT BOND- PRIVATE WORK**

	)
Recording requested by	)
_____ [name]	)
When recorded mail to	)
_____ [name]	)
_____ [address]	)
_____ [city, state, zip]	)
	)

Space above this line for recorder's use

The fee charged for this bond is \$_____ per annum.

KNOW ALL PERSONS BY THESE PRESENTS:

WHEREAS, [name and address of contractor] (hereafter designated as "Principal"), by written agreement dated _____, has contracted with _____ [name and address of owner] (hereafter designated as "Owner") to erect a [describe, e.g., 15-unit apartment building] on the property known as [address or legal description], which Agreement, and all of the Contract Documents attached to or forming a part of that Agreement (hereinafter designated as "Contract"), are hereby referred to and incorporated by reference;

NOW THEREFORE, we, the Principal and _____ and _____ [name(s), address(es), and status, if relevant of surety or sureties, e.g., ABC Insurance, a corporation duly organized under the laws of the State of _____, having its principal office at _____ (address), and authorized to transact a general surety business in the State of California] as Surety, are held and firmly bound unto Owner in the sum of \$_____, lawful money of the United States of America for the payment of which sum Principal and Surety hereby jointly and severally bind ourselves, our respective heirs, executors, administrators, successors, and assigns.

THE CONDITION OF THIS OBLIGATION IS SUCH that if the Principal, the Principal's heirs, executors, administrators, successors or assigns, or subcontractors, shall promptly make payment to all persons named in *California Civil Code Sections 3110, 3111, or 3112* for all labor and material used in the performance of the Contract before any mechanics' liens therefor shall accrue or be filed according to law, and shall pay and discharge of record all such liens which may accrue and be filed, and shall pay all costs, expenses, damages, and attorneys' fees which the Owner may incur with respect to any such liens, and shall indemnify the Owner against all liability by reason of such liens, then this obligation shall be void; otherwise this obligation shall remain in full force, subject, however, to the following conditions:

1. This bond is issued for the purpose of complying with *California Civil Code Sections 3225-3242* and all amendments thereto.
2. This bond shall inure to the benefit of any of the persons named in *Civil Code Sections 3110, 3111, 3112* to give a right of action to these persons or their assigns in any suit brought on this bond.
3. Neither Principal nor Surety shall be exonerated or released from the obligation of this bond by any of the following: (1) any change, extension of time for performance, addition, alteration, or modification affecting any contract, plans, specifications, or agreement pertaining or relating to any scheme or improvement work described above or pertaining to or relating to the furnishing of labor, materials, or equipment therefor; (2) any change or modification of any terms of payment or extension of the time for any payment pertaining or relating to any scheme or improvement work described above; (3) by any rescission or attempted rescission of the contract, agreement, or bond; (4) any conditions precedent or subsequent in the bond attempting to limit the right of recovery of claimants otherwise entitled to recover under the Contract or agreement or under the bond; or (5) any fraud by any person other than the claimant seeking to recover on the bond. This bond shall be construed most strongly against the Sureties and in favor of all persons for whose benefit this bond is given, and under no circumstances shall the Principal or Surety be released from liability to those for whose benefit this bond has been given, by reason of any breach of contract between the Owner and Principal. The sole conditions of recovery shall be that the claimant is a person described in *Civil Code Sections 3110, 3111, or 3112*, and has not been paid the full amount of his or her claim.
4. A claimant may not commence a suit or action under this bond unless the claimant has first given written notice of

his or her claim to Surety and Principal within 15 days after a notice of completion has been recorded, or, if no notice of completion is recorded, within 75 days after completion of the work of improvement, stating with substantial accuracy the (1) amount in value, as near as may be determined, of any labor, services, equipment, or materials already furnished or to be furnished, the name of the person to or for whom the labor, services, equipment, or materials were furnished; and (3) the kind of labor, services, equipment, or materials furnished or agreed to be furnished by the claimant. The notice shall be served personally or by registered mail or certified mail, postage prepaid, as provided in *Civil Code Section 3227*.

5. The aggregate liability of Surety hereunder is limited to the sum of this bond.

6. No suit, action, or proceeding shall be maintained under this bond unless commenced within 6 months years after the of completion of the work, as defined in *Civil Code Section 3086*.

IN WITNESS WHEREOF, two identical counterparts of this instrument, each of which shall for all purposes be deemed an original, have been duly executed by the above Principal and Sureties on _____[*date*].

PRINCIPAL

_____ [*signature of principal*]

_____ [*typed name*]

[By _____ (*typed name and title, if applicable*)]

SURETY

_____ [*signature of surety*]

_____ [*typed name*]

[By _____ (*typed name and title, if applicable*)]

SURETY

_____ [*signature of surety*]

_____ [*typed name*]

[By _____ (*typed name and title, if applicable*)]

Acknowledgment

[See § 79.200[2].]

Legal Topics:

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

Labor & Employment Law Employment Relationships General Overview Labor & Employment Law Employment Relationships Employment Contracts General Overview Public Contracts Law Terminations Performance Bonds



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DIVISION V: CONTRACTS AND OBLIGATIONS
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27-79 California Legal Forms--Transaction Guide § 79.246

§ 79.246 Labor and Material Payment Bond--Private Work--Dual Obligee**[1] Comment--Use of Form**

The form in [2], below, is a labor and materials payment bond, to be issued by one or more personal sureties or admitted surety insurers, to guarantee payment by the contractor of all who provide labor on or furnish materials in connection with a private construction contract [see *Civ. Code* §§ 3110, 3111, 3112 (those entitled to lien)]. It names both the owner and the construction lender as dual obligees. Like the payment bond in § 79.245[2], it sets forth key statutory provisions applicable to payment bonds for private work [see, e.g., *Civ. Code* §§ 3225, 3226, 3227(a), 3242. For further discussion of relevant provisions and additional cross references, see § 79.244[1].

For an alternative form for a payment bond for private work, see §§ 79.244[2]. Most admitted sureties will have their own payment bond forms, and will require that those forms be used.

[2] FORM

Labor and Material Payment Bond--Private Work--Dual Obligee
PAYMENT BOND--PRIVATE WORK--DUAL OBLIGEE

	)	
Recording requested by	)	
_____ [name]	)	
When recorded mail to	)	
_____ [name]	)	
_____ [address]	)	
_____ [city, state, zip]	)	
	)	

Space above this line for recorder's use

The fee charged for this bond is \$_____ per annum.

KNOW ALL PERSONS BY THESE PRESENTS:

WHEREAS, [name and address of contractor] (hereafter designated as "Principal"), by written agreement dated _____, has contracted with _____ [name and address of owner] (hereafter designated as "Owner") to erect a [describe, e.g., 15-unit apartment building] on the property known as [address or legal description], which Agreement, and all of the Contract Documents attached to or forming a part of that Agreement (hereinafter designated as "Contract"), are hereby referred to and incorporated by reference; and

WHEREAS, _____ [name and address of lender] (hereafter designated as "Lender") has agreed to lend the Owner a sum of money to be secured by a mortgage on the project to be used in making payments under the Contract, and desires protection if Contractor defaults under the Contract or failure to maintain the property free of mechanics' liens;

NOW THEREFORE, we, the Principal and _____ and _____ [name(s), address(es), and status, if relevant of surety or sureties, e.g. ABC Insurance, a corporation duly organized under the laws of the State of _____, having its principal office at _____ (address), and authorized to transact a general surety business in the State of California] as Surety, are held and firmly bound unto Owner and Lender in the sum of \$_____, lawful money of the United States of America for the payment of which sum Principal and Surety hereby jointly and severally bind ourselves, our respective heirs, executors, administrators, successors, and assigns.

THE CONDITION OF THIS OBLIGATION IS SUCH that if the Principal, the Principal's heirs, executors, administrators, successors or assigns, or subcontractors, shall promptly make payment to all persons named in *California Civil Code Sections 3110, 3111, or 3112* for all labor and material used in the performance of the Contract before any mechanics' liens therefor shall accrue or be filed according to law, and shall pay and discharge of record all such liens which may accrue and be filed, and shall pay all costs, expenses, damages, and attorneys' fees which the Owner may incur with respect to any such liens, and shall indemnify the Owner and Lender against all liability by reason of such liens, then this obligation shall be void; otherwise this obligation shall remain in full force, subject, however, to the following conditions;

1. This bond is issued for the purpose of complying with *Civil Code Sections 3225-3242* and all amendments thereto.
2. This bond shall inure to the benefit of any of the persons named in *Civil Code Sections 3110, 3111, and 3112* to give a right of action to these persons or their assigns in any suit brought on this bond.
3. Neither Principal nor Surety shall be exonerated or released from the obligation of this bond by any of the following: (1) any change, extension of time for performance, addition, alteration, or modification affecting any contract, plans, specifications, or agreement pertaining or relating to any scheme or improvement work described above or pertaining to or relating to the furnishing of labor, materials, or equipment therefor; (2) any change or modification of any terms of payment or extension of the time for any payment pertaining or relating to any scheme or improvement work described above; (3) by any rescission or attempted rescission of the contract, agreement, or bond; (4) any conditions precedent or subsequent in the bond attempting to limit the right of recovery of claimants otherwise entitled to recover under the Contract or agreement or under the bond; or (5) any fraud by any person other than the claimant seeking to recover on the bond. This bond shall be construed most strongly against the Sureties and in favor of all persons for whose benefit this bond is given, and under no circumstances shall the Principal or Surety be released from liability to those for whose benefit this bond has been given, by reason of any breach of contract between the Owner and Principal or Owner and

Lender. The sole conditions of recovery shall be that the claimant is a person described in *Civil Code Sections 3110, 3111, or 3112*, and has not been paid the full amount of his or her claim.

4. A claimant may not commence a suit or action under this bond unless the claimant has first given written notice of his or her claim to Surety and Principal within 15 days after a notice of completion has been recorded, or, if no notice of completion is recorded, within 75 days after completion of the work of improvement, stating with substantial accuracy the (1) amount in value, as near as may be determined, of any labor, services, equipment, or materials already furnished or to be furnished, the name of the person to or for whom the labor, services, equipment, or materials were furnished; and (3) the kind of labor, services, equipment, or materials furnished or agreed to be furnished by the claimant. The notice shall be served personally or by registered mail or certified mail, postage prepaid, as provided in *Civil Code Section 3227*.

5. The aggregate liability of Surety hereunder is limited to the sum of this bond.

6. No suit, action, or proceeding shall be maintained under this bond unless commenced within six months years after the of completion of the work, as defined in *Civil Code Section 3086*.

IN WITNESS WHEREOF two identical counterparts of this instrument, each of which shall for all purposes be deemed an original, have been duly executed by the above Principal and Sureties on _____[date].

PRINCIPAL

_____ [signature of principal]

_____ [typed name]

[By _____ (typed name and title, if applicable)]

SURETY

_____ [signature of surety]

_____ [typed name]

[By _____ (typed name and title, if applicable)]

SURETY

_____ [signature of surety]

_____ [typed name]

[By _____ (typed name and title, if applicable)]

Acknowledgment

[See § 79.200[2].]

Legal Topics:

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

Civil Procedure Remedies Bonds General Overview Civil Procedure Remedies Bonds Sureties General Overview



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DIVISION V: CONTRACTS AND OBLIGATIONS
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27-79 California Legal Forms--Transaction Guide § 79.247

§ 79.247 Combined Performance and Payment Bond--Private Work--Dual Obligatee**[1] Comment--Use of Form**

The form in [2], below, is a construction contract bond that combines the features of a performance bond [see §§ 79.241-79.243] with those of labor and materials payment bond [see §§ 79.244-79.246] to be issued by one or more personal sureties or admitted surety insurers, to guarantee that the contractor will faithfully perform the contract and will fully indemnify the obligees from all cost and damage that they may suffer by reason of the contractor's failure to pay all who provide labor on or furnish materials in connection with a private construction contract [see *Civ. Code* §§ 3110, 3111, 3112 (those entitled to lien)]. It names both the owner and the construction lender as dual obligees.

For ease of administration and for other reasons, combining the performance and payment bonds is not recommended [See *California Real Estate Law and Practice*, Ch. 422, *Insurance and Bonding Practices*, § 422.05[4] (Matthew Bender)]. The owner is likely to want to record the payment bond [see *Civ. Code* §§ 3225, 3236 (discussed in § 79.244[1][d]); *Civ. Code* §§ 3239-3240 (discussed in § 79.244[1][e])]. In addition, neither a provision requiring the surety's consent to modifications of the contract [*Civ. Code* § 3225] nor a provision releasing the surety from liability in the event the owner fails to pay the contractor will be permitted or enforced in a payment bond [see *Wm. R. Clarke Corp. v. Safeco Ins. Co. of America* (1997) 15 Cal. 4th 882, 886, 888, 890, 893-897, 64 Cal. Rptr. 2d 578, 938 P.2d 372 (discussed in § 79.244[1][c])], although such provisions are enforceable in a performance bond.

[2] FORM**Combined Performance and Payment Bond--Private Work--Dual Obligatee**

KNOW ALL PERSONS BY THESE PRESENTS:

WHEREAS, [name and address of contractor] (hereafter designated as "Principal"), by written agreement dated _____, has contracted with _____ [name and address of owner] (hereafter designated as "Owner") to erect a [describe, e.g., 15-unit apartment building] on the property known as [address or legal description], which Agreement, and all of the Contract Documents attached to or forming a part of that Agreement

(hereinafter designated as "Contract"), are hereby referred to and incorporated by reference; and

WHEREAS, _____ [name and address of lender] (hereafter designated as "Lender") has agreed to lend the Owner a sum of money to be secured by a mortgage on the project to be used in making payments under the Contract, and desires protection as its interests may appear, if Contractor defaults under the Contract or fails to maintain the property free of mechanics' liens. That protection shall be subject to the performance by either or both obligees of the obligations to Contractor, either in connection with the Contract or as a third party beneficiary under the loan agreement between Lender and Owner;

NOW THEREFORE, we, the Principal and _____ and _____ [name(s), address(es), and status, if relevant of surety or sureties, e.g., ABC Insurance, a corporation duly organized under the laws of the State of _____, having its principal office at _____ (address), and authorized to transact a general surety business in the State of California] as Surety, are held and firmly bound unto Owner and Lender in the sum of \$_____, lawful money of the United States of America for the payment of which sum Principal and Surety hereby jointly and severally bind ourselves, our respective heirs, executors, administrators, successors, and assigns.

THE CONDITION OF THIS OBLIGATION IS SUCH that if the Principal, the Principal's heirs, executors, administrators, successors or assigns, or subcontractors, promptly and faithfully performs all the covenants and conditions of the Contract on its part to be performed, promptly makes payment to all persons named in *California Civil Code Sections 3110, 3111, or 3112* for all labor and material used in the performance of the Contract before any mechanics' liens therefor shall accrue or be filed according to law, pays and discharges of record all such liens which may accrue and be filed, pays all costs, expenses, damages, and attorneys' fees which the Owner may incur with respect to any such liens, and indemnifies the Owner and Lender against all liability by reason of such liens, then this obligation shall be void; otherwise this obligation shall remain in full force, subject, however, to the following conditions:

1. Whenever the Principal shall be, and shall be declared by the Owner to be, in default under the Contract, the Surety may promptly remedy the default, or, in the alternative, shall have the option to assume and complete the Contract in accordance with its terms and conditions, or to obtain another to complete the Contract, and thereafter the Surety or such other person shall be subrogated to all the rights of the Principal under the Contract.
2. This bond shall inure to the benefit of any of the persons named in *Civil Code Sections 3110, 3111, and 3112* to give a right of action to these persons or their assigns in any suit brought on this bond.
3. The aggregate liability of Surety hereunder is limited to the sum of this bond. Surety, at its option, may make any payments hereunder by check payable jointly to Owner and Lender
4. No suit, action, or proceeding shall be maintained under this bond unless commenced within six months years after the of completion of the work, as defined in *Civil Code Section 3086*.

IN WITNESS WHEREOF two identical counterparts of this instrument, each of which shall for all purposes be deemed an original, have been duly executed by the above Principal and Sureties on _____ [date].

PRINCIPAL

_____ [signature of principal]

_____ [typed name]

By _____ [typed name and title, if applicable]

SURETY

_____ [signature of surety]

_____ [typed name]

[By _____ (*typed name and title, if applicable*)]

SURETY

_____ [*signature of surety*]

_____ [*typed name*]

[By _____ (*typed name and title, if applicable*)]

Acknowledgment

[See § 79.200[2].]

Legal Topics:

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

Civil Procedure Remedies Bonds General Overview Civil Procedure Remedies Bonds Sureties General Overview Civil
Procedure Remedies Bonds Sureties Liability



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DIVISION V: CONTRACTS AND OBLIGATIONS
CHAPTER 79 SURETYSHIP, GUARANTY, AND INDEMNITY
PART IV. FORMS
D. Construction Contract Bonds

27-79 California Legal Forms--Transaction Guide §§ 79.248-79.259

[Reserved]

§§ 79.248[Reserved]



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DIVISION V: CONTRACTS AND OBLIGATIONS
CHAPTER 79 SURETYSHIP, GUARANTY, AND INDEMNITY
PART IV. FORMS
E. Guaranty Agreements

27-79 California Legal Forms--Transaction Guide § 79.260

§ 79.260 Corporate Resolution Authorizing Guaranty Agreement

[1] Comment--Use of Form

The form in [2], *below*, may be used to certify a transcript or copy of a corporate resolution authorizing specified officers of the corporation to execute a guaranty agreement under which the corporation will guarantee the obligation of an obligor to an obligee. A parent or affiliated corporation is often required to provide a guaranty (and adopt a resolution authorizing the guaranty) for purchases, leases, or indebtedness of a subsidiary or affiliated company which is not considered fully qualified to accept the obligation involved without the added protection of a guaranty. Subject to any limitations contained in the articles and any other applicable laws, a corporation has the power to enter into contracts of guaranty or suretyship [*Corp. Code § 207(g); but see Corp. Code §§ 315-316* (limitations regarding guaranties of loans to directors, officers, and parent corporations and pledge of corporation's shares, or those of its parent, to secure guaranty)]. The form in [2], *below*, ratifies and confirms any previous action taken by the authorized officer(s) in regard to the execution of guaranty agreements in connection with the stated obligation.

Obligees normally will require the adoption of a resolution authorizing the specified officer(s) to execute the guaranty, and will want a certified copy of that resolution attached to a guaranty agreement executed by the officers of the corporation. The obligee may have its own form for a resolution, or specific requirements that must be stated in the resolution.

For alternative formats for resolutions and their certification, including language for use when the action was taken not at a board of directors meeting but by unanimous consent, see Ch. 5, *Directors' Meetings, Actions, and Resolutions*. For a form for an authorization for borrowing by a partnership, personally guaranteed by the partners, see § 43.205.

[2] Form

Corporate Resolution Authorizing Guaranty Agreement

CERTIFICATION OF GUARANTY RESOLUTION

I certify that:

I am the duly qualified and acting [Assistant] Secretary of _____ [name of corporation], a corporation duly organized and existing under the laws of the state of [specify state of incorporation, e.g., California].

The following is a true and correct copy of a resolution duly adopted by the Board of Directors of the corporation at a regular [or special] meeting held on _____ [date]:

WHEREAS, _____ (herein called "Obligor") intends to enter into an agreement with _____ (herein called "Obligee") whereby Obligor will be obligated to [describe obligation]; and Obligee is willing to enter into that agreement only on condition that this corporation guarantee the performance of Obligor; and

WHEREAS, it is and will be to the direct benefit, advantage and best interest of this corporation that the guaranty be given and that agreement entered into;

NOW, THEREFORE, BE IT RESOLVED THAT, to induce Obligee to enter into the agreement, and in consideration thereof, that [any one of] the following officer[s] of this corporation [is or are] hereby authorized and directed to guarantee the Obligor's performance of the agreement to Obligee, and to assign, transfer, pledge, encumber, or provide a security interest in, any and all of the property this corporation as security for that guaranty:

_____ [names or titles of officers or other personnel]

Name	Title
_____	_____
_____	—
_____	_____
_____	—

RESOLVED FURTHER, that officer[s] listed above [is or are] authorized to execute and deliver the guaranty and agreement and security agreements in any amount [not to exceed \$ _____], in any form, and on any terms and conditions [and covering any continuous, successive and periodic transactions] as Obligee may require;

RESOLVED FURTHER, that the authority of the officer[s] listed above is retroactive and all acts heretofore taken by that/those officer[s] with respect to the guaranty are hereby ratified and confirmed.

This resolution has not been modified or rescinded and is in full force and effect at the date of this certificate.

_____ Dated:

_____ [signature]

_____ [printed name]

_____ [title, e.g., Corporate Secretary or Assistant Corporate Secretary]

[corporate seal]

Legal Topics:

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

Business & Corporate Law Corporations General Overview Contracts Law Types of Contracts Guaranty Contracts



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DIVISION V: CONTRACTS AND OBLIGATIONS
CHAPTER 79 SURETYSHIP, GUARANTY, AND INDEMNITY
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E. Guaranty Agreements

27-79 California Legal Forms--Transaction Guide § 79.261

§ 79.261 Guaranty Agreement--Long Form

[1] Comment

[a] Use of Form

The form in [2], *below*, is a guaranty agreement by which one or more parties (the guarantors) guarantee an obligation of another party (the obligor) to a third party (the obligee). It may be used either to guarantee a single obligation, or, by including the appropriate optional material [see PP 1-3 of form], to provide a continuing guaranty of all indebtedness incurred between the obligor and the obligee.

The form includes provisions that are very protective of the creditor/obligee [see [b], *below*]. If the parties do not deem it necessary to separately address each issue included by the provisions of this form, § 79.262[2] is a short form guaranty agreement that can be used in place of this form. For an even more extensive form for a continuing guaranty in favor of a bank extending a commercial loan, see § 43.220.

[b] Provisions Protecting Obligatee

The form in [2], *below*, contains numerous protective provisions designed to place the creditor/obligee in the strongest possible position. Counsel may or may not deem these provisions appropriate. Before including any of the provisions contained in this form, the attorney should consider the context in which the agreement is being prepared and decide whether or not it will be desirable to include these strict creditor-protective provisions. Provisions protective of the creditor provide for the following:

- The guarantors' obligation will not be diminished by any other indebtedness that they incur or guaranties that they enter, by any direction of the obligor, or by any reorganization of the guarantors [see P 3 of form].
- The guarantors agree to waive any applicable statute of limitations to the extent permitted by law [see PP 1, 4 of form].

- The obligee is permitted to renew, compromise, extend, increase, or accelerate the time for payment or any other terms of the underlying obligation [see P 5 of form].
- The guarantors also guarantee the capacity of the obligor and its officers, directors, partners, or agents to act on the obligor's behalf [see P 6 of form].
- Any other debt that the obligor may owe to the guarantors is subordinated to the obligor's debt to the obligee [see P 7 of form].
- The obligee is granted a lien on any property of the guarantor in its possession [see P 10 of form].

In Paragraph 8 of the form, the guarantors waive any claims and defenses of the obligor (other than payment of the indebtedness) to the extent permitted by law, as well as any rights to enforce any remedy against the obligor until the obligor's debt to the obligee has been paid in full. Paragraph 8(d) is based on language approved in *Civ. Code* § 2856(c) as an effective waiver of the guarantor's rights and defenses described in *Civ. Code* § 2856(a)(2) and (3), including the following [*Civ. Code* § 2856(c); see *Civ. Code* § 2856(b) (no particular language, or references to statutes or judicial decisions, is required to waive guarantor's rights and defenses); see also § 79.20[2]]:

- Any rights or defenses the guarantor may have to the guaranty obligation by reason of an election of remedies by the creditor [see *Civ. Code* § 2856(a)(2)]; and
- Any rights or defenses the guarantor may have because the principal's obligation is secured by real property or an estate for years, including those based on, directly or indirectly, *Code Civ. Proc.* §§ 580a, 580b, 580d, or 726 [*Civ. Code* § 2856(a)(3)].

Paragraph 8(e) is somewhat redundant, because it is based on language approved in *Civ. Code* § 2856(d) as an effective waiver of the guarantor's rights and defenses by reason of any election of remedies by the creditor. The statutory language in *Civ. Code* § 2856(c) and Paragraph 8(d) also waives defenses based on election of remedies.

Neither of the statutory provisions set forth in Paragraphs 8(d) and (e) apply to a guaranty, or other type of suretyship obligation, made with respect to a loan secured by a deed of trust or a mortgage on a dwelling for not more than four families when the dwelling is occupied, entirely or in part, by the borrower and the loan was used to pay all or part of the purchase price of that dwelling [*Civ. Code* § 2856(e)].

[c] Guaranties Subject to Law of Suretyship

The distinction between guaranties and suretyship has been abolished and guaranties are subject to the laws relating to suretyship. Continuing guaranties and guaranties of collection are specifically declared to be forms of suretyship [*Civ. Code* § 2787]. For discussion of the laws governing suretyship in general, see discussion in § 79.13 et seq.

[d] Guarantor's Liability

The guarantor's obligation is unconditional unless the terms of the guaranty import a condition precedent to liability [*Civ. Code* § 2806]. Once the guarantor signs the note or separate agreement containing express words of guaranty, he or she becomes liable to the creditor immediately on the default of the principal without any demand or presentment, notice of dishonor, or protest [*Civ. Code* § 2807; *Com. Code* §§ 3419, 3504]. The guarantor's liability can be smaller than, but must not exceed (or be more burdensome than), the principal's, and if larger will simply recede accordingly [*Civ. Code* § 2809].

The guarantor remains liable, despite any personal disability of the principal, even if the disability makes the contract void against the principal. However, a guarantor is not liable if for any other reason there is no liability on the part of the principal at the time of the execution of the contract, or if the liability of the principal thereafter ceases unless the guarantor assumed the liability with knowledge of the existence of the defense [*Civ. Code* § 2810].

[e] Continuing Guaranty

A continuing guaranty is a guaranty relating to future liability of the principal under successive transactions that either continue the principal's liability or renew it from time to time after it has been satisfied [*Civ. Code* § 2814]. For example, in a case in which the principals of a corporation executed personal guaranties of payment on the corporation's commercial lease, the guaranty agreements were held to be continuing guaranties of performance under the lease that also applied to subsequent lease amendments [*Central Building, LLC v. Cooper* (2005) 127 Cal. App. 4th 1053, 1055, 26 Cal. Rptr. 3d 212] . A continuing guaranty may be revoked at any time by the guarantor with respect to future transactions, unless there is a continuing consideration for those transactions that the guarantor does not renounce [see *Civ. Code* § 2815; see also [f], below]. This form contains provisions for giving notice to the obligee that the guaranty is revoked as to future transactions [see P 3 of form].

[f] Release of Guarantor

A guarantor typically is exonerated if the principal and creditor alter the original obligation in any way without the guarantor's consent unless the principal indemnifies the guarantor [*Civ. Code* § 2819; see *R.P. Richards, Inc. v. Chartered Construction Corporation* (2000) 83 Cal. App. 4th 146, 154-155, 99 Cal. Rptr. 2d 425 (subcontractor's negotiated release of general contractor from claim for payment under bonded obligation and acceptance of unbonded obligation under settlement agreement, without surety's consent, fully extinguished general contractor's bonded obligation to subcontractor which constituted impairment of subcontractor's rights and remedies against surety; under *Civ. Code* § 2819, this had legal consequence of exonerating surety on bonded obligation)]. Acceptance by the creditor of a lesser amount in satisfaction of the original debt simply lessens the guarantor's liability [*Civ. Code* § 2822]. The guarantor's liability is not exonerated by the discharge of the principal by operation of law [*Civ. Code* § 2825], delay by the creditor in proceeding against the debtor [*Civ. Code* § 2823; see P 11 of form], or recovery of a judgment by the creditor [*Civ. Code* § 2838]. However, performance, or an appropriate offer to perform, does exonerate the guarantor [*Civ. Code* § 2839; see *Quality Wash Group V, Ltd. v. Hallak* (1996) 50 Cal. App. 4th 1687, 1701-1702, 58 Cal. Rptr. 2d 592 (as guarantors of purchaser's obligation to pay note to third party, vendors were exonerated by purchaser's satisfaction of that obligation under *Civ. Code* § 2839, and purchaser as principal obligor under note had no right to seek reimbursement or contribution from vendors as guarantors)]].

As a general rule, a guarantor is not exonerated by a change in the terms of the underlying indebtedness if the change is made with the guarantor's consent, which may be given in advance [*American City Bank v. Tourtelot* (1978) 86 Cal. App. 3d 585, 591, 150 Cal. Rptr. 361] . Though the death of the guarantor revokes a continuing guaranty, if the underlying obligation is changed after the guarantor's death, the guarantor's estate is liable if the continuing guaranty was made under an agreement that specifically authorized changes in the underlying debt to be made "either before or after revocation" [*American City Bank v. Tourtelot* (1978) 86 Cal. App. 3d 585, 591-592, 150 Cal. Rptr. 361 (change involved was renewal and extension, not additional advance); compare language in P 5 of form]. Similarly, an agreement between a creditor and a debtor to waive statutory time limitations for collection of a debt materially alters the original obligation by extending the time for its repayment, but will not exonerate a guarantor who has consented in advance to be bound despite any "extensions, waivers, or modifications" negotiated between the creditor and the debtor [*State Bd. of Equalization v. Carleton* (1990) 223 Cal. App. 3d 1607, 1610, 273 Cal. Rptr. 436 ; see P 4 of form].

[2] FORM

Guaranty Agreement--Long Form

GUARANTY AGREEMENT

This guaranty is given by _____ [name(s)] ("Guarantor[s]") to _____ [name] ("Obligee") to induce Obligor to [describe obligation guaranteed, e.g., extend credit] to _____ [name] ("Obligor").

1. Obligation Guaranteed. For valuable consideration, the undersigned Guarantors jointly and severally unconditionally guarantee to Obligor the following obligation[s] of Obligor: _____ [describe obligation(s) guaranteed, e.g., (for continuous guaranty of all indebtedness), the payment of any and all indebtedness of Obligor to Obligor. The word "indebtedness" is used in its most comprehensive sense and includes any and all advances, debts, obligations, and liabilities of Obligor, whenever made, incurred, or created, whether voluntary or involuntary and however arising, whether due or not due, absolute or contingent, liquidated or unliquidated, determined or undetermined,] and whether Obligor may be liable individually or jointly with others, or whether recovery may be or become barred by any statute of limitations or otherwise become unenforceable.

2. Death, Insolvency, or Bankruptcy. Guarantors jointly and severally unconditionally guarantee the payment of [restate obligation to be guaranteed; e.g., (for a continuing guaranty): any and all indebtedness of Obligor to Obligor], whether or not due or payable by Obligor, on (a) the death, dissolution, insolvency, or business failure of, or any assignment for the benefit of creditors by, or commencement of any bankruptcy, reorganization, arrangement, moratorium, or other debtor relief proceedings by or against, Obligor or Guarantors, or (b) the appointment of a receiver for, or the attachment, restraint of, or making or levying of any court order or legal process affecting, the property of Obligor or Guarantors, and jointly and severally unconditionally promise to pay this indebtedness to Obligor or order, on demand, in lawful money of the United States.

3. Extent of Liability. The joint and several liability of Guarantors shall not exceed [at any one time] the sum of \$[for principal, together with all interest on the indebtedness or any part not exceeding the foregoing limitation, and attorneys' fees, costs, and expenses as provided in Paragraph 9 of this agreement]. [For a continuing guaranty, add: This guaranty may be terminated with regard to future transactions provided Guarantors give written notice of termination to Obligor. Notice shall be deemed effective as of noon of the next succeeding business day following receipt of notice by Obligor. No notice of termination shall release Guarantors, whether or not giving the notice, from any liability as to any guaranteed indebtedness that may be owing to or held by Obligor or in which Obligor may have an interest or for which Obligor may be obligated at the time of receiving notice, and all extensions or renewals.] The liability of Guarantors under this agreement is exclusive and independent of any security for or other guarantee of the indebtedness of Obligor, whether executed by Guarantors or any other party, and the liability of Guarantors under this Agreement is not affected or impaired by any of the following:

- (a) Any indebtedness exceeding Guarantors' liability;
- (b) Any direction of application by Obligor or any other party;
- (c) Any other continuing or other guaranty, undertaking, or maximum liability of Guarantors or of any other party as to the indebtedness of Obligor;
- (d) Any payment on or in reduction of any other guaranty or undertaking;

[For a continuing guaranty: (e) Any notice of termination of this agreement as to future transactions given by, or the death or termination of, or the revocation or release of any obligations under this agreement of, any other of the Guarantors;]

- (f) Any dissolution, termination, or increase, decrease, or changes of personnel of any of the Guarantors; or

(g) Any payment made to the Obligee on the indebtedness that Obligee repays to Obligor pursuant to court order in any bankruptcy, reorganization, arrangement, moratorium, or other debtor relief proceeding. Guarantors waive any right to the deferral or modification of Guarantor's obligations by virtue of any such proceeding.

4. Joinder of Parties. The obligations of guarantors are joint and several, and independent of the obligations of Obligor. Obligee who may bring and prosecute a separate action or actions against Guarantors, whether it brings an action against Obligor or joins Obligor in any action or actions commenced. Guarantors waive, to the fullest extent permitted by law, the benefit of any statute of limitations affecting their liability under this agreement or the enforcement of this agreement. Any payment by Obligor or other circumstance that operates to toll any statute of limitations as to Obligor shall also operate to toll the statute of limitations as to Guarantors. Any Guarantor who is a married person agrees that recourse may be had against his or her separate property for his or her obligations under this agreement.

5. Change of Obligation. (a) Guarantors authorize Obligee, (whether or not after revocation or termination of this guaranty) without notice or demand (except any notice or demand that is required by statute and cannot be waived) and without affecting or impairing their liability, from time to time to do any of the following:

- (1) Renew, compromise, extend, accelerate, or otherwise change the time for performance of, or otherwise change the terms of the obligation [including increase or decrease the rate of interest];
- (2) Take and hold security for the performance of this guaranty or the obligation guaranteed, and exchange, enforce, waive, and release any security;
- (3) Apply security and direct the order or manner of sale of security as Obligee in its discretion may determine; and
- (4) Release or substitute any one or more of the Guarantors.

(b) Obligee may without notice assign this guaranty in whole or in part.

6. Capacity and Authority. If Obligor is a corporation, partnership or other entity, Obligee need not inquire into or verify the powers of Obligor or the authority of those acting or purporting to act on behalf of Obligor, and this Guaranty shall be enforceable with respect to any indebtedness Obligee grants or extends to Obligor in reliance on the purported exercise of those powers or authority.

7. Subordination. Any indebtedness of Obligor now or later held by Guarantors is subordinated to the indebtedness of Obligor to Obligee, and all indebtedness of Obligor to Guarantors, if Obligee so requests, shall be collected, enforced, and received by Guarantors as trustees for Obligee and be paid over to Obligee on account of the indebtedness of Obligor to Obligee, without affecting or impairing in any manner the liability of Guarantors under the other provisions of this guaranty. [Any instruments now or later evidencing any indebtedness of Obligor to the undersigned shall be marked with a legend that they are subject to this guaranty, and, if Obligee so requests, shall be delivered to Obligee.]

8. Waiver of Defenses. (a) Guarantors waive any right to require Obligee to (1) proceed against Obligor; (2) proceed against or exhaust any security held from Obligor; or (3) pursue any other remedy in Obligee's power whatsoever.

(b) Guarantors waive any defense based on or arising out of any defense of Obligor other than payment in full of the indebtedness, including without limitation any defense based on or arising out of the disability of Obligor, the unenforceability of the indebtedness from any cause, or the cessation from any cause of the liability of Obligor other than payment in full of the indebtedness.

(c) Obligee, at its election, may foreclose on any security held by Obligee by one or more judicial sales, whether or not every aspect of any sale is commercially reasonable, or exercise any other right or remedy Obligee may have against Obligor, or any security, without affecting or impairing in any way the liability of Guarantors under this agreement, except to the extent that the indebtedness has been paid.

[Choose one or both of the following, as appropriate:]

[To waive all rights and defenses in Civ. Code § 2856(a)(2) and (3), use:]

(d) Guarantors waive all rights and defenses that Guarantors may have because Obligor's debt is secured by real property. This means, among other things:

(1) Obligee may collect from Guarantors without first foreclosing on any real or personal property collateral pledged by Obligor.

(2) If Obligee forecloses on any real property collateral pledged by Obligor:

(A) The amount of the debt may be reduced only by the price for which that collateral is sold at the foreclosure sale, even if the collateral is worth more than the sale price.

(B) Obligee may collect from the Guarantors even if Obligee, by foreclosing on the real property collateral, has destroyed any right Guarantor may have to collect from Obligor.

This is an unconditional and irrevocable waiver of any rights and defenses Guarantor may have because the Obligor's debt is secured by real property. These rights and defenses include, but are not limited to, any rights and defenses based on *Code of Civil Procedure Sections 580a, 580b, 580d, and 726*.

[To waive any rights or defenses guarantor may have to guaranty obligation by reason of election of remedies by obligee, use:]

(e) Guarantor waives all rights and defenses arising out of an election of remedies by Obligee, even though that election of remedies, such as nonjudicial foreclosure with respect to security for a guaranteed obligation, has destroyed Guarantor's rights of subrogation and reimbursement against the principal by operation of *Code of Civil Procedure Section 580d* or otherwise.

[Continue with the following:]

(f) Until all indebtedness of Obligor to Obligee is paid in full, even though that indebtedness is in excess of Guarantors' liability under this agreement, Guarantors shall have no right of subrogation, shall waive any right to enforce any remedy that Obligee now has or may later have against Obligor, and shall waive any benefit of, and any right to, participation in any security now or later held by Obligor. Guarantors waive all presentments, demands for performance, notices of protest, notices of dishonor, notices of acceptances of this guaranty, and notices of the existence, creation, or incurring of new or additional indebtedness.

(g) Guarantors assume all responsibility for keeping themselves informed of Obligor's financial condition and assets,

and of all other circumstances bearing on the risk of nonpayment of the indebtedness and the nature, scope, and extent of the risks that Guarantors assume and incur under this agreement, and agree that Obligees shall have no duty to advise Guarantors of information known to it regarding those circumstances or risks.

9. Attorneys' Fees and Costs. In addition to the amounts guaranteed under this agreement, Guarantors jointly and severally agree to pay reasonable attorneys' fees and all other costs and expenses incurred by Obligees in enforcing this guaranty in any action or proceeding arising out of, or relating to, this guaranty.

10. Liens and Setoffs. In addition to all liens on, and rights of setoff against the money, securities, or other property of Guarantors given to Obligees by law, Obligees shall have a lien on and a right of setoff against all money, securities, and other property of Guarantors now or later in the possession of Obligees, whether held in a general or special account, or for safekeeping or otherwise; and every lien and right of setoff may be exercised without demand on or notice to Guarantors.

11. Nonwaiver of Rights of Obligees. No right or power of Obligees under this agreement shall be deemed to have been waived by any act or conduct on the part of Obligees, or by any neglect to exercise that right or power, or by any delay in so doing; and every right or power shall continue in full force and effect until specifically waived or released by an instrument in writing executed by Obligees.

12. Singular and Plural. In all cases when there is but a single Obligor or a single Guarantor, all words used in the plural shall be deemed to have been used in the singular if the context and construction so require; and when there is more than one Obligor, or when this guaranty is executed by more than one Guarantor, the word "Obligor" and the word "Guarantor" respectively shall mean all and any one or more of them.

13. Effect on Heirs and Assigns. This guaranty and the liability and obligations of Guarantors under this agreement are binding on Guarantors and their respective heirs, executors, and assigns, and inure to the benefit of and are enforceable by Obligor and its successors, transferees, and assigns.

14. Notices. Any notice given by any party under this guaranty shall be personally delivered or sent by United States mail, postage prepaid, and addressed to Obligees or Guarantor at their respective addresses for notices indicated below. Guarantor and Obligees may change the place to which notices, requests, and other communications are to be sent to them by giving written notice of that change to the other.

15. Governing Law and Modification. This guaranty shall be deemed to be made under, and shall be governed by, the laws of the State of California in all respects, including matters of construction, validity, performance, and enforcement, and its terms and provisions may not be waived, altered, modified, or amended except in writing duly signed by an authorized officer of Obligees and by Guarantors.

16. Invalidity. If any provision of this guaranty contravenes or is held invalid under the laws of any jurisdiction, this guaranty shall be construed as though it did not contain that provision, and the rights and liabilities of the parties to this agreement shall be construed and enforced accordingly.

17. Headings. Headings in this agreement are for convenience only and shall not be used to interpret or construe its provisions.

18. Counterparts. This agreement may be executed in two or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same instrument.

IN WITNESS WHEREOF, the undersigned have executed this Guaranty on _____ [date].

GUARANTOR[s]

[signature of guarantor]_____
[typed name of guarantor]

[By _____ (typed name and title, if applicable)]

[signature of guarantor]_____
[typed name of guarantor]

[By _____ (typed name and title, if applicable)]

Address for Notices to Guarantor:

ATTN: _____

OBLIGOR

[signature of obligor]_____
[typed name of obligor]

[By _____ (typed name and title, if applicable)]

Address for Notices to Obligor:

ATTN: _____

Legal Topics:

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

Civil Procedure Remedies Bonds General Overview Civil Procedure Remedies Bonds Sureties General Overview Contracts
Law Types of Contracts Guaranty Contracts



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27-79 California Legal Forms--Transaction Guide § 79.262

§ 79.262 Guaranty Agreement--Short Form**[1] Comment****[a] Use of Form**

The form in [2], below, is a general purpose guaranty form that can be used when detailed provisions affecting the guaranty are not necessary. It can be used to guarantee a single transaction or, with inclusion of the bracketed language, as a guaranty of continuing transactions. For a detailed guaranty agreement and comments on the law affecting guaranties, see § 79.261[2].

[b] Relationship of Sureties to Guarantors

Although the distinction between sureties and guarantors has been abolished, *Civ. Code* § 2787 refers to "continuing guaranties," and many forms are commonly captioned "guaranty agreements" and refer to guarantors rather than sureties. It would be possible to refer to the following form as a suretyship agreement and make reference to a continuing suretyship relationship. However, by long-standing custom and according to the practice of the trade, the promise of a person not in the business of being a surety is referred to as a guaranty. The legal effectiveness of the obligation is not affected by the terminology used in describing the obligation or the parties. It is important that the obligation guaranteed or bonded be clearly provided for and that the guarantor's or surety's liability and the situations releasing their liability be spelled out.

[2] FORM**Guaranty Agreement--Short Form****GUARANTY AGREEMENT**

This guaranty is given by _____[name] ("Guarantor") to _____[name] ("Creditor") to induce Creditor to [describe obligation guaranteed, e.g., extend credit] to _____[name] ("Debtor").

Guarantor guarantees to Creditor the prompt payment of _____[*describe obligation guaranteed, e.g., the loan made to Debtor evidenced by a promissory note dated _____*]. [*Add if applicable: This is a continuing guaranty and will remain in force until revoked by Guarantor by giving notice in writing to Creditor. Revocation will be effective only as to transactions entered into after receipt of notice of revocation by Creditor.*] This guaranty covers the renewal of the debt guaranteed by this instrument or extensions of time for payment thereof. Guarantor agrees to pay on demand all sums due or to become due by Debtor to Creditor as well as attorney's fees and expenses incurred by Creditor by reason of Debtor's default.

Executed on _____[*date*], at _____[*city*], California.

GUARANTOR

_____ [signature]

[*typed name and title*]

Legal Topics:

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

Contracts LawTypes of ContractsGuaranty Contracts



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27-79 California Legal Forms--Transaction Guide § 79.263

§ 79.263 Guaranty of Negotiable Instrument

[1] Comment

[a] Use of Form

This form provides the briefest of guaranties for use on a negotiable instrument. The form provides alternatives for guaranty of payment or guaranty of collection [see *[b]* and *[c]*, below]. When used on a negotiable instrument, the guaranty applies to the particular obligation provided for in the instrument. For this reason, a continuing guaranty [see *Civ. Code* § 2787] should not be stated in any particular instrument, but should be included in a separate document that is specifically made applicable to a continuing course of transactions. For longer forms for guaranty of payment and collection, including options that spell out the difference between a guaranty of payment (payee may take direct action against guarantor) and a guaranty of collection, see § 55.321[2]. See generally Ch. 55, *Negotiable Instruments*, for defenses available to makers, guarantors, and accommodation parties [see also *In re Alcock* (9th Cir. 1995) 50 F.3d 1456, 1460 n.4 (defense based on impairment of collateral, given by *UCC* § 3606, repealed in California in 1992, remains viable in California under similar language in *Com. Code* § 3605(e), regarding discharge of indorser or accommodation party)].

[b] Guaranty of Payment

An "accommodation party" is a party to a negotiable instrument who signs the instrument for the purpose of incurring liability on the instrument without being a direct beneficiary of the value given for the instrument [*Com. Code* § 3419(a)]. A person signing a negotiable instrument is presumed to be an accommodation party [*Com. Code* § 3419(c)]. If the accommodation party signs the instrument to guarantee payment, the accommodation party is obliged to pay the instrument in the capacity in which he or she has signed, whether as maker, drawer, acceptor, or indorser. The obligation of an accommodation party may be enforced notwithstanding any statute of frauds and whether or not the accommodation party receives consideration for the accommodation [*Com. Code* § 3419(b)]. The first alternative of the form provides for guaranty of payment.

[c] Guaranty of Collection

If the signature of the accommodation party is accompanied by words unambiguously indicating that the accommodation party is guaranteeing collection rather than guaranteeing payment, the accommodation party is obliged to pay the amount due on the instrument only if one of the following occurs [*Com. Code § 3419(d)*]:

- Execution of judgment against the other party has been returned unsatisfied.
- The other party is insolvent or in an insolvency proceeding.
- The other party cannot be served with process.
- It is otherwise clear that payment cannot be obtained from the other party.

The second alternative of the form provides for guaranty of collection.

[2] FORM

Guaranty of Negotiable Instrument

Guaranty of Payment

"Payment Guaranteed"

_____ [*signature of guarantor*]
[*typed name*]

[OR]

Guaranty of Collection

"Collection Guaranteed"

_____ [*signature of guarantor*]
[*typed name*]

Legal Topics:

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

Contracts LawNegotiable InstrumentsGeneral OverviewContracts LawNegotiable InstrumentsEnforcementGeneral OverviewContracts LawTypes of ContractsGuaranty Contracts



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CHAPTER 79 SURETYSHIP, GUARANTY, AND INDEMNITY
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E. Guaranty Agreements

27-79 California Legal Forms--Transaction Guide § 79.264

§ 79.264 Guaranty Agreement by Assignor of Promissory Note Secured by Deed of Trust**[1] Comment--Use of Form**

The guaranty agreement in [2], below, is for use by the payee of a note secured by a deed of trust to guarantee payment of the note in connection with a sale or assignment of that note to a third party. The holder of a note who is willing to execute a guaranty agreement may be able to realize a greater percentage of the face amount of the note because of the additional security provided by the guaranty. The agreement contains a provision for limiting the extent of the guarantor's liability. If the note is sold at a discount, the limit of the guarantor's liability normally should not exceed the amount for which the note was sold to the assignee, plus interest. For an alternative guaranty of a promissory note, which does not include mention of any security and is intended to be endorsed on the note, see § 97.202[2].

[2] FORM**Guaranty Agreement by Assignor of Promissory Note Secured by Deed of Trust****GUARANTY AGREEMENT**

For value received, I guarantee all payments due under the note, dated _____, executed by _____ [name of maker(s)], and payable to _____ [name of payee], in the original amount of \$_____, with interest at _____ percent per annum, with a present unpaid balance of \$_____, payable in equal [specify, e.g., monthly or annual] installments of \$_____, plus interest, on [specify, e.g., the first day of every month], beginning _____ [date], on which the first payment of \$_____, plus interest, has been made on _____ [date]. That note is secured by a trust deed on property described as follows: [insert legal description of property]. The note and trust deed have been assigned to [name of assignee]. I expressly waive presentment for payment, notice of nonpayment, and protest to any extension of time of payment under the note granted by [name of assignee] to _____ [name of maker]. This guaranty is to remain in full force and effect until written notice of its termination is received by _____ [name of payee/guarantor] at _____ [address].

Provided, however, that at no time shall I be liable under this agreement for more than \$_____, plus unpaid interest.

I further agree, without demand, to reimburse [*name of assignee*] for all costs and expenses, including attorneys' fees, incurred in the enforcement of this agreement or the collection of the indebtedness.

IN WITNESS WHEREOF, the undersigned has executed this agreement on this _____ day of [*month*], [*year*].

GUARANTOR

_____ [*signature of payee/guarantor*]
[*typed name*]

Legal Topics:

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

Contracts LawNegotiable InstrumentsGeneral OverviewContracts LawNegotiable InstrumentsEnforcementGeneral OverviewContracts LawTypes of ContractsGuaranty Contracts



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27-79 California Legal Forms--Transaction Guide §§ 79.265-79.269

[Reserved]

§§ 79.265[Reserved]



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27-79 California Legal Forms--Transaction Guide § 79.270

§ 79.270 Corporate Resolution Authorizing Third-Party Indemnity Agreement

[1] Comment--Use of Form

The form in [2], *below*, includes a resolution of the board of directors of a corporation authorizing specified officers of the corporation to enter into a third-party indemnity agreement with a surety. A corporation normally enters into this type of agreement because it has some material interest in the principal applying to the surety for the bond. The form in [2], *below*, includes both the resolution and its certification, signed by the corporate secretary.

The resolution is designed to permit indemnification of the surety in connection with a particular principal and transaction, but it could be modified to contain more general terms authorizing the officers to enter into third-party indemnity agreements in all appropriate situations [*see Corp. Code § 207(g)* (corporation's power to enter into contracts of guaranty or suretyship); *but see Corp. Code §§ 204(a)(11), 207(8), 317* (limitations on indemnification of officer, director, or agent)].

For general discussion of the adoption of corporate resolutions and alternative formats for resolutions and their certification, including language for use when the action was taken not at a board of directors meeting but by unanimous consent, see Ch. 5, *Directors' Meetings, Actions, and Resolutions*. For a resolution authorizing indemnification of an agent of the corporation, see § 2.240[2].

[2] FORM

Corporate Resolution Authorizing Third-Party Indemnity Agreement

I certify that:

I am the duly qualified and acting [Assistant] Secretary of _____ [name of corporation], a corporation duly organized and existing under the laws of the state of [specify state of incorporation, e.g., California].

The following is a true and correct copy of a resolution duly adopted by the Board of Directors of the corporation at a

[regular or special] meeting of the Board of Directors duly called and held on _____ [date], a quorum being present:

WHEREAS, this Company is materially interested through [nature of interest, e.g., stock ownership, sale of merchandise, sale of materials, etc.] in the transaction pertaining to [describe nature of transaction requiring bond or undertaking], in connection with which _____ [name of principal in behalf of which bond is requested] has applied to _____ [name of surety] (hereinafter called Surety) for a [bond or undertaking]; and

WHEREAS, Surety is willing to execute the [bond or undertaking] as surety only on the written indemnity of this Company;

RESOLVED, that the following officer[s] [is or are] hereby authorized and directed to execute on behalf of this Company any indemnity agreement or agreements required by the Surety as consideration for the execution by it of any [bond or undertaking] on behalf of [principal] in connection with the matter or transaction described above:

Name	Title
_____	_____
_____	—
_____	_____
_____	—

RESOLVED FURTHER, that the officer[s] named above [is or are] hereby authorized and empowered, at any time prior or subsequent to the execution by the Surety of any [bonds or undertakings], to execute any and all amendments to the aforementioned indemnity agreement or agreements; and to execute any other or further agreements relating to any the [bonds or undertakings] or to any collateral that may have been, or be required to be, deposited with the Surety in connection therewith; and to take any and all other actions that may be requested or required by the Surety.

RESOLVED FURTHER, that the authority of the officer[s] listed above is retroactive and all acts heretofore taken by [that officer or those officers] with respect to the indemnity agreement[s] are hereby ratified and confirmed.

This resolution has not been modified or rescinded and is in full force and effect at the date of this certificate.

_____ Dated:

_____ [signature]

_____ [printed name]

_____ [title, e.g., Corporate Secretary or Assistant Corporate Secretary]

[corporate seal]

Legal Topics:

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

Business & Corporate Law Corporations General Overview Contracts Law Contract Conditions & Provisions Indemnity Contracts Law Third Parties General Overview Contracts Law Types of Contracts Guaranty Contracts



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27-79 California Legal Forms--Transaction Guide § 79.271

§ 79.271 Third-Party Indemnity Agreement

[1] Comment

[a] Use of Form

The form in [2], *below*, is an agreement by one party (indemnitor) to indemnify a surety or guarantor against liability on a bond or guaranty issued or to be issued by the surety or guarantor for the benefit of a principal, obligor, or debtor who does not have sufficient financial resources of its own to be acceptable as indemnitor. The agreement specifies the surety's or guarantor's rights to reimbursement and indemnification by the indemnitor in the event claims are made or sums advanced under the bond or guaranty [*see Civ. Code §§ 2847-2849* (discussed in § 79.18)]. In addition, if the surety or guarantor requires, the form in [2], *below*, includes provision for the indemnitor to grant the surety or guarantor a security interest in collateral [*see PP 2 and 3 of form; see also Civ. Code § 2849* (surety's right to benefit of security given to creditor, discussed in § 79.18); *Civ. Code § 2854* (creditor's right to benefit of security given to surety, discussed in § 79.19)]. The rights provided for in the agreement in [2], *below*, differ in some respects from those specified in *Civ. Code § 2778*, discussed in § 79.23, which provides rules for interpretation of indemnity contracts when no contrary intention is specified.

If an admitted surety company has issued the bond, that company will likely have its own indemnification agreement form and require that its form be used. Third-party indemnification agreements are often required in the following situations:

- From officers and/or principal stockholders of a corporation applying for a bond.
- From a parent corporation when a subsidiary corporation is applying for a bond.
- From the partners or members when a partnership or limited liability company is applying for a bond. An indemnity agreement often is required even though the personal assets of the partners are liable for the debts of the partnership because a creditor of a partner in the partner's individual capacity may have priority over the creditors of the partnership.

- From a silent or limited partner when the partnership is applying for a bond. When a limited partnership is involved, it is essential to have the personal agreement of limited partners to act as indemnitors if they are to be personally liable for any amount over and above their investment in the partnership.

For an alternative third-party indemnity agreement form containing provisions appropriate for use in connection with performance and payment bonds issued for a construction project, see § 79.272.

[b] Effectiveness of Agreement

If the bond or guaranty is executed by the surety/guarantor before the indemnity agreement is signed by the indemnitor without conditioning the effectiveness of the bond or guaranty to the execution of the indemnity agreement, the agreement may be declared void because of lack of consideration [*see also Civ. Code* § 2792 (discussed in § 79.13)]. Thus, the preamble to this agreement specifically describes the bond or guaranty for which it is executed.

Although the effectiveness of signature of indemnitor is not affected by the lack of a notarial acknowledgment, the signature must be proved by witnesses or other evidence in a court proceeding if they have not been acknowledged before a notary public. In addition, it is usually necessary for the board of directors of a corporation to specifically authorize the execution of an indemnity agreement by its officers. See § 79.270[2] for such a resolution.

[2] FORM

Third-Party Indemnity Agreement

INDEMNITY AGREEMENT

This Agreement is entered into on _____ [date], between _____ [name(s) of indemnitor(s)], [indemnitor's status, e.g., a California corporation], (hereinafter called "Indemnitor") and _____ [name of surety or guarantor], _____ [surety's or guarantor's status if relevant, e.g., a corporation duly organized under the laws of the State of _____], having its principal office at _____ (address)] (hereinafter called ["Surety" or "Guarantor"]).

_____ [Name and status of principal on bond or obligor of guaranteed obligation] (hereinafter called ["Principal" or "Obligor"]) is engaged in the business of [describe, e.g., manufacturing widgets], in which Indemnitor is materially interested in by reason of [describe, e.g., its ownership of a majority interest therein]. In order to [specify, e.g., develop new products], ["Principal" or "Obligor"] will be required to [specify, e.g., borrow money] from _____ [name of beneficiary of bond or guaranty], which is willing to [specify, e.g., extend that credit] only on condition that it be guaranteed by [Surety's bond or Guarantor's guaranty].

In consideration of [Surety or Guarantor]'s execution of its [bond as surety or guaranty], dated _____, in favor of _____ [name of beneficiary of bond or guaranty] in the amount of \$[continue if further description of bond or obligation is desired],

The parties agree:

1. **Indemnification.** Indemnitor shall indemnify [Surety or Guarantor] against all liability, claims, demands, losses, damages, costs, charges, and expenses, including reasonable attorneys' fees, that [Surety or Guarantor] may in any way sustain, incur, or become liable for in consequence of the [bond or guaranty], or any renewal of the [bond or guaranty], or any new [bond or guaranty] issued in continuation of, or as a substitute for, the [bond or guaranty], or in defending or prosecuting any suit, action, or other proceeding brought in connection therewith, in obtaining or attempting to obtain a

release from liability in that respect. Indemnitor shall reimburse [Surety or Guarantor] for, or pay over to [Surety or Guarantor], all sums of money which [Surety or Guarantor] pays or becomes liable to pay by reason of any of the foregoing, and shall make those payments to [Surety or Guarantor] as soon as it becomes liable therefor, whether or not [Surety or Guarantor] shall have paid out those sums, or any part thereof.

2. **Security.** In order to secure [Surety or Guarantor] against loss by reason of any breach of the foregoing covenant of indemnity by Indemnitor, Indemnitor shall grant to [Surety or Guarantor] a security interest in collateral security satisfactory to [Surety or Guarantor] having a fair market value at the time equal to at least [e.g., 60] percent of the amount for which [Surety or Guarantor] is to become liable by reason of the [bond or guaranty]. The giving of this collateral security and the security interest are a condition precedent to the assumption of liability by [Surety or Guarantor]. Indemnitor may either deposit the collateral with [Surety or Guarantor] or retain possession of the security for use in its business. Indemnitor shall execute a security agreement on any property so retained. [Surety or Guarantor] shall have a security interest in all collateral security given in respect of any obligation of Indemnitor until receipt of satisfactory evidence of the termination of its liability as [surety or guarantor] on account of any obligation.

3. **Rights with Respect to Security.** If Indemnitor defaults under its covenant of indemnity, [Surety or Guarantor] shall have with respect to the collateral security the rights and remedies provided in the Uniform Commercial Code in force in the State of California on the date of this Agreement.

4. **Rights with Respect to Claims.** [Surety or Guarantor] may settle, adjust, or compromise any claim, suit, or judgment in respect of any obligation of [Principal secured Surety or Obligor guaranteed Guarantor], after notice to Indemnitor, unless Indemnitor desires to litigate any claim, defend any suit, or appeal any judgment and simultaneously deposits with [Surety or Guarantor] additional collateral security sufficient to pay any judgment rendered, with interest, costs, and expenses. [Surety or Guarantor]'s right to indemnification under this Agreement shall extend to money paid by it in settlement of compromise of any claims, suits, and judgments in good faith after notice to Indemnitor.

5. **Rights with Respect to Litigation.** If any suit, action, or other proceeding is brought by or against a creditor, or an assignee of a creditor of [Principal or Obligor] in connection with any of its obligations guaranteed by [Surety or Guarantor], [Surety or Guarantor], at Indemnitor's expense, may either participate in, or at its election, assume the defense or prosecution of that suit, action, or other proceeding. In the latter event, Indemnitor may employ counsel and participate therein. If any suit, action, or other proceeding is brought by [Surety or Guarantor] against Indemnitor for breach of its covenant of indemnity contained in this Agreement, separate suits may be brought as causes of action accrue, without prejudice or bar to the bringing of subsequent suits on any other cause or causes of action, whether theretofore or thereafter accruing.

6. **Indemnitor Primarily Liable.** As between Indemnitor and [Surety or Guarantor], Indemnitor shall be primarily liable for the payment of all its obligations guaranteed by [Surety or Guarantor]. Nothing in this Agreement shall be construed to waive, abridge, or diminish any right or remedy [Surety or Guarantor] might otherwise have against Indemnitor.

7. **Evidence of Indemnitor's Liability.** If [Surety or Guarantor] pays any sums of money by reason of its [suretyship or guaranty], the vouchers or other evidence showing any payment shall be prima facie evidence against Indemnitor of the fact and amount of its liability to [Surety or Guarantor] hereunder.

8. **Payment.** In consideration of its execution of its [bond or guaranty], [Surety or Guarantor] shall be entitled to receive \$[or specify other measure of consideration].

9. **Successors Bound.** This Agreement shall be binding on and inure to the benefit of the parties and their legal representatives and successors, but it shall not inure to the assigns of either party unless the other party gives written consent thereto.

10. Notices. Any notice given by any party under this Agreement shall be personally delivered or sent by United States mail, postage prepaid, and addressed to Indemnitor or [Surety or Guarantor] at their respective addresses for notices indicated below. Indemnitor or [Surety or Guarantor] may change the place to which notices, requests, and other communications are to be sent to them by giving written notice of that change to the other.

11. Attorneys' Fees. If any action, proceeding, or arbitration arising out of or relating to this Agreement is commenced by either Indemnitor or [Surety or Guarantor], the prevailing party shall be entitled to receive from the other party, in addition to any other relief that may be granted, the reasonable attorneys' fees, costs, and expenses incurred in the action, proceeding, or arbitration by the prevailing party.

12. Governing Law. This Indemnity Agreement and the legal relations between the parties shall be governed by and construed in accordance with the laws of the State of California.

13. Headings. Headings in this agreement are for convenience only and shall not be used to interpret or construe its provisions.

14. Counterparts. This Agreement may be executed in two or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same Agreement.

IN WITNESS WHEREOF, the parties have signed this Agreement on- _____ [date] .

INDEMNITOR

_____ [name of indemnitor]

By: _____ [signature]

_____ [typed name and title]

Address for Notices to Indemnitor:

ATTN: _____

_____ [SURETY or GUARANTOR]

_____ [name of surety or guarantor]

By: _____ [signature]

_____ [typed name and title]

Address for Notices to _____ [Surety or Guarantor]:

ATTN: _____

Acknowledgment

[See § 79.200[2].]

Legal Topics:

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

Civil Procedure Remedies Bonds General Overview Civil Procedure Remedies Bonds Sureties General Overview Contracts Law Contract Conditions & Provisions Indemnity Contracts Law Third Parties General Overview Contracts Law Types of

ContractsGuaranty Contracts



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27-79 California Legal Forms--Transaction Guide § 79.272

§ 79.272 Third-Party Indemnity Agreement--Alternative Form

[1] Comment--Use of Form

The form in [2], below, is an alternative form of third-party indemnity agreement in which the indemnitor indemnifies a surety against liability or loss on a bond issued or to be issued by the surety for the benefit of a principal, obligor, or debtor who does not have sufficient financial resources of its own to be acceptable as indemnitor. It differs from the third-party indemnity agreement in § 79.271 in that it is much broader and more specific and includes provisions specifically applicable to construction contract bonds, i.e, performance and payment bonds [see Sections 4, 5 (description of security), 17]. Significant differences between this form and the *form in § 79.271* include the following:

- The preamble states that it applies not only to bonds, but also to undertakings and recognizances.
- The indemnitors promise to pay the premiums on the bond [Section 1], usually something the principal would do.
- The indemnitors may be required to deposit funds in a reserve against losses to be maintained at the Surety's discretion [Section 3].
- It specifically provides for the surety to exercise the right to complete the construction project, or cause it to be completed by someone else, and waives all claims for negligence or defects in that completion except for deliberate malfeasance [Section 4].
- The security provisions are more detailed and refer to the types of assets likely to be involved in a construction project [Sections 5, 6, and 7]. Security includes not only all sums due or to become due under the contract on account of which the bonds were issued, but under any and all contracts in which the indemnitors have an interest [Section 5].
- It allows the surety to procure some other entity to issue the bond(s) and to reinsure its liability under

the bond and gives any other sureties or reinsurers the same rights the primary surety has under this indemnity agreement [Section 11].

■ The indemnitors specifically appoint surety their attorney-in-fact for exercise of all rights granted by the indemnity agreement, including the right to endorse checks representing payment of contract monies [Section 17].

■ The indemnitors waive all defenses, including exemptions from execution [Section 18]. Note that this provision would be void in California as contrary to public policy [*see Code Civ. Proc. § 703.040*]. It is included in this form for illustrative purposes, however, because some preprinted forms used by corporate sureties, especially sureties operating in several states, do contain a waiver of exemptions. Counsel should be aware of the unenforceability of such provisions in California and may refer to this provision as an example of the language that may be encountered in standardized forms.

An admitted surety is likely to have its own third-party indemnity agreement form, and require that its form be used.

[2] FORM

Third-Party Indemnity Agreement--Alternative Form

INDEMNITY AGREEMENT

KNOW ALL PERSONS BY THESE PRESENTS, that whereas the undersigned, hereinafter called Indemnitors, do hereby request _____ [*name of surety*] to execute or procure the execution of a bond, or bonds, undertakings, or recognizances (all of which are hereinafter included within the term "bond or bonds") on behalf of _____ [*name of principal*], hereinafter referred to as Principal, and in favor of _____ [*name of obligee*], the Indemnitors hereby representing that they have a material interest in the principal obtaining the execution of such a bond or bonds;

NOW THEREFORE, in consideration of the premises and of the execution or continuance of such a bond or bonds, the Indemnitors, for themselves, their heirs, executors, administrators, successors and assigns, do hereby jointly and severally covenant and agree with the Surety, its successors and assigns, as follows:

1. The Indemnitors will pay, when due, all premiums for each of such bonds in accordance with the Surety's regular manual rates in effect on the date each of such bonds become effective, as long as liability thereunder shall continue, and until the Surety is furnished with evidence satisfactory to the Surety of its discharge or release from the bonds or of all liability by reason of the bonds.
2. The Indemnitors will indemnify the Surety against any and all liability, loss, costs, damages, attorneys' fees and other expenses that the Surety may sustain or incur by reason of, or in consequence of the execution of such bond or bonds and any renewal, continuation, or successor bond or bonds, including but not limited to sums paid or liabilities incurred in settlement of, and expenses paid or incurred in connection with claims, suits, or judgments under such bonds, expenses paid or incurred in enforcing the terms of this Agreement, in procuring or attempting to procure release from liability, or in recovering or attempting to recover losses or expenses paid or incurred.
3. If the Surety sets up a reserve to cover any liability, claim asserted, suit, or judgment under any such bonds, the Indemnitors will, immediately on demand and whether or not the Surety has made any payment therefor, deposit with the Surety a sum of money equal to that reserve and any increase in the collateral security on such a bond or bonds, and that sum and any other money or property that has been or hereafter shall be pledged as collateral security on any such bond shall be available, in the discretion of the Surety, as collateral security on all bonds coming within the scope of

this instrument or for any other indebtedness of the Indemnitors to the Surety; and any such collateral security shall be held subject to the Surety's regular terms of receipt for collateral, which are by reference made a part of this agreement.

4. If any such bonds be given in connection with a contract, the Surety in its sole discretion is hereby authorized, but not required, to do any or all of the following:

(a) Consent to any change in the contract or in the plans and specification relating thereto.

(b) Make or guarantee advances or loans for the purposes of the contract without any obligation to see to the application thereof, it being understood that the amount of all such advances or loans shall be conclusively presumed to be a loss hereunder for which the Indemnitors are liable;

(c) In the event of any default of the performance of the contract, or the breach of this agreement or of any bond or bonds connected therewith, or the failure to diligently prosecute the work under any contract or to pay for labor and materials used in the prosecution of the contract, or in the event work has ceased or been suspended on any contract or contracts covered by said bonds, take possession of the work under the contract, and, at the expense of the Indemnitors, complete the contract or cause it to be completed, or to consent to the completion of the work, and to take any other action that the Surety may deem appropriate. In the event that the Surety takes possession of the work as provided above, the Indemnitors hereby release and discharge the Surety, in this connection, from all liability for all its actions and omissions except for deliberate malfeasance.

5. The Indemnitors hereby assign, transfer, pledge, and convey to the Surety (effective as of the date of each such bond or bonds, but only in the event of default, breach, or failure as referred to in Section 4), as collateral security, to secure the obligations hereunder and any other indebtedness and liabilities of the Indemnitors to the Surety, all of their rights under the contracts referred to in such bonds, including their right, title, and interest in and to (1) all subcontracts let in connection therewith and those subcontractors' surety bonds, (2) all machinery, plant, equipment, tools, and materials which shall be on the site or sites of the work or elsewhere for the purposes of the contracts, including all materials ordered for the contracts, and (3) any and all sums due or which may thereafter become due under those contracts and all sums due or to become due on all other contracts, bonded or unbonded, in which any or all of the Indemnitors have an interest.

6. The Surety may at its option, file or record this agreement or any other document executed by any of the Indemnitors, individually or jointly, in connection with application, issuance, or execution of any bond or bonds coming within the scope of this instrument, as a security agreement or as part of a financing statement or as notice of its prior interest and assignment under the provisions of the Uniform Commercial Code or any other statute or regulation of any jurisdiction or agency, but that the filing or recording of such a document shall be solely at the option of the Surety and that the failure to do so shall not release or impair any of the obligations of the Indemnitors under this agreement.

7. If any of the bonds coming within the scope of this instrument are executed in connection with a contract which by its terms or by law prohibits assignment of contract proceeds, or any part thereof, the Indemnitors agree to hold all money or other proceeds of the contract, whether received as payment or loan, as a trust for the benefit of Surety and to use that money or other proceeds for the purpose of performing the contract and discharging the obligation of the bond, and for no other purpose, until the bond is completely exonerated.

8. The Surety shall have the exclusive right to decide and determine whether any claim, liability, suit, or judgment made or brought against the Surety or the Indemnitors or any one of them on any bond or bonds shall or shall not be paid, compromised, resisted, defended, tried, or appealed, and the Surety's decision, if made in good faith, shall be final and binding on the Indemnitors, unless the Indemnitors request Surety to litigate that claim or demand, or to defend that suit, or to appeal from that judgment, and deposit with the Surety, at the time of the request, cash or collateral satisfactory to the Surety in kind and amount, to be used in paying any judgment or judgments rendered, or that may be rendered, with

interest, costs, expenses, and attorneys' fees, including those of the Surety. An itemized statement of payments made by the Surety for any of the purposes specified herein, sworn to by an officer of the Surety, or the voucher or vouchers for those payments, shall be prima facie evidence of liability of the Indemnitors to reimburse the Surety for those payments, with interest.

9. The Indemnitors hereby authorize the Surety in its sole discretions to do the following:

(a) From time to time to make or consent to any substitute for or renewal of, any bond or bonds coming within the scope of this instrument, or in any contract referred to in any such bond, and this instrument shall apply to the substituted or changed bond or renewal.

(b) If any bonds be given in an action or proceeding in any court, to recognize any attorney of record in that action or proceeding for any party to that action or proceeding as the date of the execution of that bond as the authorized representative of that party until the Surety has been fully discharged from liability under that bond.

(c) To take any steps the Surety may deem necessary or proper to obtain release from liability from any such bond or bonds.

10. The Indemnitors hereby waive notice of the execution of any such bonds or of any act, fact, or information coming to the notice or knowledge of the Surety concerning or affecting its rights or liabilities under any such bond or rights or liabilities of the Indemnitors hereunder, notice of all such being hereby expressly waived.

11. If the Surety procures any other company or companies to execute or join with it in executing, or to reinsure, any such bond or bonds, this instrument shall inure to the benefit of that other company or companies, its or their successors and assigns, so as to give to it or them a direct right of action against the Indemnitors to enforce this instrument and, in that event, the word "Surety," wherever used in this Agreement, shall be deemed to include that company or those companies, as their respective interests may appear.

12. The liability of the Indemnitors hereunder shall not be affected by the failure of any party to sign any such bonds, nor by any claim that other indemnity or security was to have been obtained, nor the release of any indemnity, or Indemnitor, nor the return or exchange of any collateral that may have been obtained; and if any party signing this instrument is not bond for any reason, this obligation shall still be binding on each and every other party.

13. Separate suits may be brought hereunder as causes of action accrue, and suit may be brought against any or all of the Indemnitors; and suit or suits on one or more causes of action, or against one or more of the Indemnitors, shall not prejudice or bar subsequent suits against any other or all of the Indemnitors on the same or any other cause or causes of action, whether theretofore or thereafter accruing.

14. The Indemnitors waive any defense that this instrument was executed subsequent to the date of any such bond, admitting and covenanting that such bond was executed pursuant to the Indemnitors' request and in reliance on the Indemnitors' promise to execute this instrument. In the event any part of this indemnity agreement shall be void under the law of the place governing the construction of this agreement, then that part only shall be considered as deleted and the remainder of this agreement shall endure in full force and effect.

15. The Surety, at its option, may decline to execute or participate in or procure the execution of any such bonds.

16. Wherever used in this instrument, the plural term shall include the singular and the singular shall include the plural.

17. The Indemnitors hereby irrevocably nominate, constitute, appoint, and designate the Surety or its designee as their Attorney in Fact with the right, but not the obligation, to exercise all of the rights of Indemnitors assigned, transferred,

and set over to the Surety in this Agreement, and to make, execute, and deliver any and all additional or other assignments, documents, or papers, including but not limited to the execution of instruments referred to in Section 5, and the endorsement of checks or other instruments representing payment of contract monies, deemed necessary and proper by the Surety in order to give full effect not only to the intent and meaning of the within assignments, but also to the full protection intended to be given to the Surety under all other provisions of this Agreement. The Indemnitors hereby ratify and affirm all acts and actions taken and done by the Surety or its designee as such Attorney in Fact.

[Caution: Paragraph 18 below is unenforceable in California under Code Civ. Proc. § 703.040; see discussion in [1], above.]

18. The Indemnitors hereby waive and abandon, so far as their respective obligations under this agreement are concerned, all rights to claim any of the property, including the respective homesteads, as exempt from levy, execution, sale, or other legal process under the laws of any state, territory, or possession.

19. This agreement may not be changed or modified orally. No change or modification shall be effective unless specifically agreed to in writing.

IN WITNESS WHEREOF, the Indemnitors, intending to be legally bound by the terms of this Agreement, have signed this Agreement on _____[date].

INDEMNITORS

_____[signature of Indemnitor]
 _____[typed name]
 _____[address]
 _____[signature of Indemnitor]
 _____[typed name]
 _____[address]
 _____[signature of Indemnitor]
 _____[typed name]
 _____[address]

Acknowledgment

[See § 79.200[2].]

Legal Topics:

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

Civil Procedure Remedies Bonds General Overview Civil Procedure Remedies Bonds Sureties General Overview Contracts Law Contract Conditions & Provisions Indemnity Contracts Law Third Parties General Overview Contracts Law Types of Contracts Guaranty Contracts



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California Legal Forms--Transaction Guide

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DIVISION V: CONTRACTS AND OBLIGATIONS
 CHAPTER 79 SURETYSHIP, GUARANTY, AND INDEMNITY
 PART IV. FORMS
 F. Indemnity Agreements

27-79 California Legal Forms--Transaction Guide § 79.273

§ 79.273 Two-Party Indemnity Agreement

[1] Comment--Use of Form

The form in [2], *below*, is an agreement by one party (indemnitor) to indemnify a surety or guarantor against liability on a bond or guaranty issued by the surety or guarantor. Unlike the *form in § 79.271[2]*, it is a two-party indemnity agreement. Like the *form in § 79.271[2]*, it is designed to specify the surety's or guarantor's rights to reimbursement and indemnification by the primary obligor/indemnitor [*see Civ. Code §§ 2847-2849* (discussed in § 79.18)]. If the surety is an admitted surety company, it will likely require its own form of indemnification agreement to be executed by either the primary obligor on the bond or another more financially secure entity [*see discussion in § 79.271[1]*].

Unlike the agreement in § 79.271[2], the indemnity agreement in [2], *below*, can be used to apply to multiple bonds or guaranties. For example, it can be used when a parent or related corporation is likely to execute bonds or guaranties on a regular basis for the indemnitor in favor of third parties. To make the agreement applicable to a series of bonds or guaranties, the following modifications should be made to the form:

- Make the descriptions of the transactions in the second and third introductory paragraphs refer to multiple bonds or guaranties.
- Include the bracketed language "from time to time, in its discretion" in the third introductory paragraph.
- Include the bracketed last sentence of Paragraph 1.
- Include Paragraph 10.
- Use the plural when appropriate in Paragraphs 1, 2, and 8.

Paragraph 10 provides for termination of the indemnity agreement by the indemnitor. The surety or guarantor has no

need to terminate the indemnity agreement, but instead would refuse to execute a particular bond or guaranty requested by the indemnitor or revoke a bond or continuing guaranty it had already executed. The phrase "at its discretion" in the third paragraph of the preamble refers to this right on the part of the surety or guarantor to refuse to execute a specific bond or guaranty. The guarantor's right to revoke a continuing guaranty or a surety's right to terminate a bond already executed depends on the terms of the particular bond or guaranty [see *Civ. Code* § 2815 (guarantor's right to revoke continuing guaranty, discussed in §§ 79.16, 79.261[1][e], [f]); *Code Civ. Proc.* § 996.310 *et seq.* (surety's right to terminate bond governed by Bond and Undertaking Law)].

For an alternative two-party indemnity agreement form particularized for use in connection with performance and payment bonds issued for a construction project, see § 79.274[2].

[2] FORM

Two-Party Indemnity Agreement

INDEMNITY AGREEMENT

This Agreement is entered into on _____ [date], between _____ [name(s) of indemnitor(s)], [indemnitor's status, e.g., a California corporation], (hereinafter called "Indemnitor") and _____ [name of surety or guarantor], _____ [surety's or guarantor's status if relevant, e.g., a corporation duly organized under the laws of the State of _____], having its principal office at _____ (address)] (hereinafter called ["Surety" or "Guarantor"]).

Indemnitor is engaged in the business of [describe, e.g., widgets], in which [Surety or Guarantor] is materially interested in by reason of [describe, e.g., its ownership of a majority interest in Indemnitor]. In order to [specify, e.g., sell its receivables from time to time], Indemnitor will be required to [specify, e.g., (provide surety bonds in favor of purchasers to) guarantee collection of the receivables sold].

In consideration of [Surety or Guarantor]'s execution of its _____ [bond(s) as surety or _____ (guaranty or guaranties)], [from time to time, in its discretion,] as requested by Indemnitor in favor of [describe beneficiaries of bond(s) or guaranty/guaranties, e.g., purchasers of Indemnitor's receivables] [continue if further description of bond or obligation is desired], the parties agree:

1. Indemnification. Indemnitor shall indemnify [Surety or Guarantor] against all liability, claims, demands, losses, damages, costs, charges, and expenses, including reasonable attorneys' fees, that [Surety or Guarantor] may in any way sustain, incur, or become liable for in consequence of the _____ [bond(s) or _____ (guaranty or guaranties)], or any renewals of the _____ [bond(s) or _____ (guaranty or guaranties)], or any new [bond or guaranty] issued in continuation of or as a substitute for [the or any] [bond or guaranty], or in defending or prosecuting any suit, action, or other proceeding brought in connection therewith, in obtaining or attempting to obtain a release from liability in respect thereof. Indemnitor shall reimburse [Surety or Guarantor] for, or pay over to [Surety or Guarantor], all sums of money which [Surety or Guarantor] pays or becomes liable to pay by reason of any of the foregoing, and shall make those payments to [Surety or Guarantor] as soon as it becomes liable therefor, whether or not [Surety or Guarantor] shall have paid out those sums, or any part thereof. [This Agreement applies to all _____ (bonds or guaranties) applied for by Indemnitor and executed by _____ (Surety or Guarantor), whether or not those _____ (bonds or guaranties) refer to this Agreement.]

2. Security. In order to secure [Surety or Guarantor] against loss by reason of any breach of the foregoing covenant of indemnity by Indemnitor shall grant to [Surety or Guarantor] a security interest in collateral security satisfactory to [Surety or Guarantor] having a fair market value at the time equal to at least [e.g., 60] percent of the amount for which

[Surety or Guarantor] is to become liable by reason of the _____ [bonds or _____ (guaranty or guaranties)]. The giving of this collateral security and the security interest are a condition precedent to the assumption of liability by [Surety or Guarantor]. Indemnitor may either deposit the collateral with [Surety or Guarantor] or retain possession of the security for use in its business. Indemnitor shall execute a security agreement on any property so retained. [Surety or Guarantor] shall have a security interest in all collateral security given in respect of any obligation of Indemnitor until receipt of satisfactory evidence of the termination of its liability as [surety or guarantor] on account of any obligation.

3. Rights with Respect to Security. If Indemnitor defaults under its covenant of indemnity, [Surety or Guarantor] shall have with respect to the collateral security the rights and remedies provided in the Uniform Commercial Code in force in the State of California on the date of this Agreement.

4. Rights with Respect to Claims. [Surety or Guarantor] may settle, adjust, or compromise any claim, suit, or judgment in respect of any obligation of Indemnitor [secured or guaranteed] by [Surety or Guarantor], after notice to Indemnitor, unless Indemnitor desires to litigate any claim, defend any suit, or appeal any judgment and simultaneously deposits with [Surety or Guarantor] additional collateral security sufficient to pay any judgment rendered, with interest, costs, and expenses. [Surety or Guarantor]'s right to indemnification under this Agreement shall extend to money paid by it in settlement of compromise of any claims, suits, and judgments in good faith after notice to Indemnitor.

5. Rights with Respect to Litigation. If any suit, action, or other proceeding is brought by or against a creditor, or an assignee of a creditor of Indemnitor in connection with any of its obligations guaranteed by [Surety or Guarantor], [Surety or Guarantor], at Indemnitor's expense, may either participate in, or at its election, assume the defense or prosecution of that suit, action, or other proceeding. In the latter event, Indemnitor may employ counsel and participate therein. If any suit, action, or other proceeding is brought by [Surety or Guarantor] against Indemnitor for breach of its covenant of indemnity contained in this Agreement, separate suits may be brought as causes of action accrue, without prejudice or bar to subsequent suits on any other cause or causes of action, whether accruing before or after that suit, action, or proceeding.

6. Indemnitor Primarily Liable. As between Indemnitor and [Surety or Guarantor], Indemnitor shall be primarily liable for the payment of all its obligations guaranteed by [Surety or Guarantor]. Nothing in this Agreement shall be construed to waive, abridge, or diminish any right or remedy [Surety or Guarantor] might otherwise have against Indemnitor.

7. Evidence of Indemnitor's Liability. If [Surety or Guarantor] pays any sums of money by reason of its [suretyship or guaranty], the vouchers or other evidence showing any payment shall be prima facie evidence against Indemnitor of the fact and amount of its liability to [Surety or Guarantor] hereunder.

8. Payment. In consideration of its execution of its _____ [bond(s) or _____ (guaranty or guaranties)], [Surety or Guarantor], Indemnitor shall pay to [Surety or Guarantor] \$[or specify other measure of consideration].

9. Successors Bound. This Agreement shall be binding on and inure to the benefit of the parties and their legal representative and successor, but it shall not inure to the assigns of either party unless the other party gives written consent thereto.

[Add if indemnity agreement is to apply to more than one bonds or guaranty:]

10. Termination. Indemnitor may terminate this Agreement with regard to future transactions by giving [Surety or Guarantor] [specify time required, e.g., not less than 10 days] written notice of termination. Notice of termination shall

not release Indemnitor or modify, limit, discharge, or affect Indemnitor's liability under this Agreement with regard to any [bond or guaranty] executed prior to termination.

[Continue with the following:]

11. Notices. Any notice given by any party under this Agreement shall be personally delivered or sent by United States mail, postage prepaid, and addressed to Indemnitor or [Surety or Guarantor] at their respective addresses for notices indicated below. Indemnitor or [Surety or Guarantor] may change the place to which notices, requests, and other communications are to be sent to them by giving written notice of that change to the other.

12. Attorneys' Fees. If any action, proceeding, or arbitration arising out of or relating to this Agreement is commenced by either Indemnitor or [Surety or Guarantor], the prevailing party shall be entitled to receive from the other party, in addition to any other relief that may be granted, the reasonable attorneys' fees, costs, and expenses incurred in the action, proceeding, or arbitration by the prevailing party.

13. Governing Law. This Indemnity Agreement and the legal relations between the parties shall be governed by and construed in accordance with the laws of the State of California.

14. Headings. Headings in this agreement are for convenience only and shall not be used to interpret or construe its provisions.

15. Counterparts. This Agreement may be executed in two or more counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same Agreement.

IN WITNESS WHEREOF, the parties have signed this Agreement on _____ [date].

INDEMNITOR

_____ [name of indemnitor]

By: _____ [signature]

_____ [typed name and title]

Address for Notices to Indemnitor:

ATTN: _____

_____ [SURETY or GUARANTOR]

_____ [name of surety or guarantor]

By: _____ [signature]

_____ [typed name and title]

Address for Notices to _____ [Surety or Guarantor]:

ATTN: _____

Acknowledgment

[See § 79.200[2].]

Legal Topics:

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

Civil Procedure Remedies Bonds General Overview Civil Procedure Remedies Bonds Sureties General Overview Contracts
Law Contract Conditions & Provisions Indemnity Contracts Law Types of Contracts Guaranty Contracts



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DIVISION V: CONTRACTS AND OBLIGATIONS
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27-79 California Legal Forms--Transaction Guide § 79.274

§ 79.274 Two-Party or Third-Party Indemnity Agreement

[1] Comment--Use of Form

The form in [2], *below*, can be used either as an alternative to the two-party indemnity agreement in § 79.273[2], or as a third-party indemnity agreement. Like the third-party indemnity agreement in § 79.272[2], it contains provisions specifically related to performance and payment bonds issued in connection with a construction project [see discussion in § 79.272[1] and Sections 4, 5, and 17 of the form in [2], *below*]. Like the two-party indemnity agreement in § 79.273[2], is it continuous and provides both for issuance of more than one bond, and for termination [see Section 19; see also discussion in § 79.273[1]].

The preamble of the form in [2], *below*, provides that it covers multiple bonds and undertakings issued by the surety at the request of the indemnitor(s), whether for the indemnitor as principal on those bonds, as co-principal, or for third parties whose names are furnished by the indemnitor(s). In addition, the form in [2], *below*, specifically provides for the following:

- Payment of the premiums on the bond(s) [Section 1].
- A reserve against losses, which indemnitors must fund, to be maintained at the surety's discretion [Section 3].
- The surety's exercise of the right to complete the construction project, or cause it to be completed by someone else, and waiver of all claims for negligence or defects in that completion except for deliberate malfeasance [Section 4].
- Detailed security provisions, which refer to the types of assets likely to be involved in a construction project [Sections 5, 6, and 7]. Security includes not only all sums due or to become due under the contract on account of which the bonds were issued, but under any and all contracts in which the indemnitors have an interest. [Section 5].

- The surety's right to procure some other entity to issue the bond(s) and to reinsure its liability under the bond(s) and for any other sureties or reinsurers to have the same rights the primary surety has under this indemnity agreement [Section 11].
- The indemnitors' appointment of the surety as their attorney-in-fact for exercise of all rights granted by the indemnity agreement, including the right to endorse checks representing payment of contract funds [Section 17].
- Waiver by indemnitors of defenses to execution against their property, including waiver of exemptions from execution [Section 18]. Note that this provision would be void in California as contrary to public policy [*see Code Civ. Proc. § 703.040*]. It is included in this form for illustrative purposes, however, because some preprinted forms used by corporate sureties, especially sureties operating in several states, do contain a waiver of exemptions. Counsel should be aware of the unenforceability of such provisions in California and may refer to this provision as an example of the language that may be encountered in standardized forms.

An admitted surety is likely to have its own indemnity agreement form and to require that its form be used.

[2] FORM

Two-Party or Third-Party Indemnity Agreement

INDEMNITY AGREEMENT

KNOW ALL PERSONS BY THESE PRESENTS, that whereas the undersigned, hereinafter called Indemnitors, have requested _____ [*name of Surety*] to execute or procure the execution of a bond, or bonds, undertakings, or recognizances (all of which are hereinafter included within the term "bond or bonds") that have been and hereafter may be applied for directly or through an agent, attorney, or other representative or required, solely as co-adventurer with others, by any of the Indemnitors or by any person, firm, corporation, or association, whose name shall for that purpose, have been furnished to the Surety by any of the Indemnitors, it being understood and agreed that this instrument shall cover all bonds so applied for and executed, whether or not this instrument is referred to or mentioned in connection with such bond or bonds;

NOW THEREFORE, in consideration of the promises and of the execution or continuance of such bond or bonds, the Indemnitors, for themselves, their heirs, executors, administrators, successors and assigns, do hereby jointly and severally covenant and agree with the Surety, its successors and assigns, as follows:

1. The Indemnitors will pay, when due, all premiums for each of such bonds in accordance with the Surety's regular manual rates in effect on the date each of such bonds become effective, as long as liability thereunder shall continue, and until the Surety is furnished with evidence satisfactory to the Surety of its discharge or release from the bonds or of all liability by reason of the bonds.
2. The Indemnitors will indemnify the Surety against any and all liability, loss, costs, damages, attorneys' fees, and other expenses which the Surety may sustain or incur by reason of, or in consequence of the execution of such bonds and any renewal, continuation, or successor of those bonds, including but not limited to sums paid or liabilities incurred in settlement of, and expenses paid or incurred in connection with claims, suits, or judgments under such bonds, expenses paid or incurred in enforcing the terms of this Agreement, in procuring or attempting to procure release from liability, or in recovering or attempting to recover losses or expenses paid or incurred.

3. If the Surety sets up a reserve to cover any liability, claim asserted, suit, or judgment under any such bond, the Indemnitors, immediately on demand and whether or not the Surety has made any payment therefor, will deposit with the Surety a sum of money equal to that reserve and any increase in collateral security on the bond or bonds, and that sum and any other money or property that has been or shall hereafter be pledged as collateral security on any such bond shall be available, in the discretion of the Surety, as collateral security on all bonds coming within the scope of this instrument or for any other indebtedness of the Indemnitors to the Surety; and any such collateral security shall be held subject to the terms of the Surety's regular form of receipt for collateral, which is by reference made a part of this Agreement.

4. If any such bonds are given in connection with a contract, the Surety in its sole discretion is hereby authorized, but not required, to do any or all of the following:

(a) Consent to any change in the contract or in the plans and specification relating to the contract.

(b) Make or guarantee advances or loans for the purposes of the contract without any obligation to see to the application thereof, it being understood that the amount of all such advances or loans shall be conclusively presumed to be a loss hereunder for which the Indemnitors are liable.

(c) In the event of any default in the performance of the contract, or the breach of this agreement or of any bond connected with the contract, or the failure to diligently prosecute the work under any contract, or to pay for labor and materials used in the prosecution of the contract, or in the event work has ceased or been suspended on any contract or contracts covered by any such bonds, take possession of the work under the contract, and, at the expense of the Indemnitors, complete the contract or cause the same to be completed, or to consent to the completion of the contract, and take any other action that the Surety may deem appropriate. In the event that the Surety takes possession of the work as above provided, the Indemnitors hereby release and discharge the Surety, in this connection, from all liability for all its actions and omissions except for deliberate malfeasance.

5. The Indemnitors hereby assign, transfer, pledge, and convey to the Surety (effective as of the date of each such bond, but only in the event of default, breach, or failure as referred to in Section 4), as collateral security, to secure the obligations hereunder and any other indebtedness and liabilities of the Indemnitors to the Surety, all of their rights under the contracts referred to in such bonds, including their right, title, and interest in and to (1) all subcontracts let in connection therewith and those subcontractors' surety bonds, (2) all machinery, plant, equipment, tools, and materials which shall be on the site or sites of the work or elsewhere for the purposes of the contracts, including all materials ordered for the contracts, and (3) any and all sums due or which may thereafter become due under those contracts and all sums due or to become due on all other contracts, bonded or unbonded, in which any or all of the Indemnitors have an interest.

6. The Surety, at its option, may file or record this agreement or any other document executed by any or all of the Indemnitors, individually or jointly, in connection with application, issuance, or execution of any bond or bonds, as a security agreement or as part of a financing statement or as notice of its prior interest and assignment under the provisions of the Uniform Commercial Code or any other statute or regulation of any jurisdiction or agency, but that the filing or recording of such a document shall be solely at the option of the Surety and that the failure to do so shall not release or impair any of the obligations of the Indemnitors under this agreement.

7. If any of the bonds are executed in connection with a contract which by its terms or by law prohibits assignment of contract proceeds, or any part of those proceeds, the Indemnitors covenant and agree to hold all money or other proceeds of the contract, whether received as payment or loan, as a trust for the benefit of Surety and to use that money or other proceeds for the purpose of performing the contract and discharging the obligation of the bond, and for no other purpose, until the bond is completely exonerated.

8. The Surety shall have the exclusive right to decide and determine whether any claim, liability, suit, or judgment made or brought against the Surety or the Indemnitors or any one of them on any such bond shall or shall not be paid, compromised, resisted, defended, tried, or appealed, and the Surety's decision, if made in good faith, shall be final and binding on the Indemnitors, unless the Indemnitors request the Surety to litigate that claim or demand, or to defend that suit, or to appeal from that judgment, and deposit with the Surety, at the time of the request, cash or collateral satisfactory to the Surety in kind and amount, to be used in paying any judgment or judgments rendered, or that may be rendered, with interest, costs, expenses, and attorneys' fees, including those of the Surety. An itemized statement of payments made by the Surety for any of the purposes specified in this Agreement, sworn to by an officer of the Surety, or the voucher or vouchers for those payments, shall be prima facie evidence of liability of the Indemnitors to reimburse the Surety for those payments, with interest.

9. The Indemnitors hereby authorize the Surety in its sole discretions to do the following:

(a) From time to time, to make or consent to any change in, or issue any substitute for or renewal of, any such bond, or in any contract referred to in any such bond, and this instrument shall apply to the substituted or changed bond or renewal.

(b) If any such bond is given in an action or proceeding in any court, to recognize any attorney of record in that action or proceeding for any party to that action at the date of the execution of that bond as the authorized representative of that party until the Surety has been fully discharged from liability under that bond.

(c) To take any steps the Surety may deem necessary or proper to obtain release from liability from any such bond.

10. The Indemnitors hereby waive notice of the execution of any such bonds or of any act, fact, or information coming to the notice or knowledge of the Surety concerning or affecting its rights or liabilities under any such bond or rights or liabilities of the Indemnitors under this agreement, notice of all such being hereby expressly waived.

11. If the Surety procures any other company or companies to execute or join with it in executing, or to reinsure, any such bonds, this instrument shall inure to the benefit of that other company or companies, its or their successors and assigns, so as to give to it or them a direct right of action against the Indemnitors to enforce this instrument and, in that event, the word "Surety," wherever used in this Agreement, shall be deemed to include that company or those companies, as their respective interests may appear.

12. The liability of the Indemnitors under this agreement shall not be affected by the failure of any party to sign any such bond nor by any claim that other indemnity or security was to have been obtained, nor by the release of any indemnity, or Indemnitor, nor the return or exchange of any collateral that may have been obtained; and if any party signing this instrument is not bound for any reason, this obligation shall still be binding on each and every other party.

13. Separate suits may be brought under this agreement as causes of action accrue, and suit may be brought against any or all of the Indemnitors; and suit or suits on one or more causes of action, or against one or more of the Indemnitors, shall not prejudice or bar subsequent suits against any other or all of the Indemnitors on the same or any other cause or causes of action, whether accruing before or after such suits.

14. The Indemnitors waive any defense that this instrument was executed subsequent to the date of any such bond, admitting and covenanting that such bond was executed pursuant to the Indemnitors' request and in reliance on the Indemnitors' promise to execute this instrument. In the event any part of this indemnity agreement is void under the law of the place governing the construction of this Agreement, then that part only shall be considered as deleted and the remainder of this agreement shall endure in full force and effect.

15. The Surety, at its option, may decline to execute or participate in or procure the execution of any such bonds.

16. Wherever used in this instrument, the plural term shall include the singular and the singular shall include the plural.

17. The Indemnitors hereby irrevocably nominate, constitute, appoint, and designate the Surety or its designee as their Attorney in Fact with the right, but not the obligation, to exercise all of the rights of Indemnitors assigned, transferred, and set over to the Surety in this Agreement, and in the name of the Indemnitors or any of them, to make, execute, and deliver any and all additional or other assignments, documents, or papers, including but not limited to the execution of instruments referred to in Section 5, and the endorsement of checks or other instruments representing payment of contract monies, deemed necessary and proper by the Surety in order to give full effect not only to the intent and meaning of the within assignments, but also to the full protection intended to be given to the Surety under all other provisions of this Agreement. The Indemnitors hereby ratify and affirm all acts and actions taken and done by the Surety or its designee as Attorney in Fact.

[Caution: Paragraph 18 below is unenforceable in California under Code Civ. Proc. § 703.040; see discussion in [1], above.]

18. The Indemnitors hereby waive and abandon, so far as their respective obligations under this agreement are concerned, all rights to claim any of the property, including the respective homesteads, as exempt from levy, execution, sale, or other legal process under the laws of any state, territory, or possession.

19. The obligation of the Indemnitors hereunder shall be continuous; provided however, that any of the Indemnitors may give the Surety not less than 30 days written notice by registered mail of his or her desire to terminate this agreement; but any notice of termination shall not operate to modify, bar, discharge, limit, affect, or impair his or her liability hereunder on or by reason of any such bond executed prior to the termination of 30 days.

20. This agreement may not be changed or modified orally. No change or modification shall be effective unless specifically agreed to in writing.

IN WITNESS WHEREOF, the Indemnitors, intending to be legally bound by the terms of this Agreement, have signed this Agreement on _____[date].

INDEMNITORS

_____[signature of Indemnitor]
 _____[typed name]
 _____[address]
 _____[signature of Indemnitor]
 _____[typed name]
 _____[address]
 _____[signature of Indemnitor]
 _____[typed name]
 _____[address]

Acknowledgment

[See § 79.200[2].]

Legal Topics:

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

Civil Procedure Remedies Bonds Sureties General Overview Contracts Law Contract Conditions & Provisions Indemnity Contracts Law Types of Contracts Guaranty Contracts



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27-79 California Legal Forms--Transaction Guide § 79.275

§ 79.275 Short Form Indemnity Agreement**[1] Comment--Use of Form**

The form in [2], below, is a short and informal indemnification agreement intended for use by an individual to indemnify one or more other individuals who guaranteed an obligation, acted as personal surety on a bond, or as in the example used in the form, signed a note as accommodation maker. It does not set forth the statutory rights of the party indemnified, such as the right to reimbursement, indemnification, and application of security [see *Civ. Code* §§ 2847-2849, §§ 79.18, 79.19].

[2] FORM**Short Form Indemnity Agreement****INDEMNITY AGREEMENT**

This Agreement is entered into on _____ [date], between _____ [name(s) of indemnitor(s)] ("Indemnitor[s]") and _____ [names of sureties or guarantors] ("Indemnitee[s]").

Indemnitee[s], without consideration and solely for the benefit and accommodation of Indemnitor _____ [specify, e.g., made and delivered, together with Indemnitor, on this date, their joint promissory note for \$30,000 bearing interest at the rate of 9 percent per annum, payable to John Doe, or order, six months after date].

I, Indemnitor, shall indemnify Indemnitee[s], and each of them] and [Indemnitee's or their] respective legal representative[s], from and against all liability by reason of [specify, e.g., Indemnitee's execution of that promissory note] and hold them harmless against all demands, claims, actions, losses, and expenses arising therefrom, including reasonable attorneys' fees.

Executed on _____ [date], at _____ [city], California.

INDEMNITOR

_____ [signature]
[typed name]

Acknowledgment

[See § 79.200[2].]

Legal Topics:

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

Contracts LawContract Conditions & ProvisionsIndemnityContracts LawTypes of ContractsGeneral OverviewContracts LawTypes of ContractsGuaranty Contracts



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DIVISION V: CONTRACTS AND OBLIGATIONS

Chapters 80-83 [Reserved]

27-80 California Legal Forms--Transaction Guide Chapters 80-83

[Reserved]

Chapters 80[Reserved]